CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 33 **April 14, 1999** **NO. 15**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 144

(T.D. 98–74)

RIN 1515–AB99

LAY ORDER PERIOD; GENERAL ORDER; PENALTIES; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to the document published in the Federal Register that adopted as a final rule, with some changes, proposed amendments to the Customs Regulations regarding, among other things, the obligation of the owner, master, pilot, operator, or agent of an arriving carrier to provide notice to Customs and to a bonded warehouse of the presence of merchandise or baggage that has remained at the place of arrival or unlading beyond the time period provided by regulation without entry having been completed. The correction involves a conforming change to the Customs Regulations pertaining to rewarehouse entries.

EFFECTIVE DATE: This correction is effective March 31, 1999.

FOR FURTHER INFORMATION CONTACT:

For legal matters: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings (202) 927–2344.

For operational matters: Steven T. Soggin, Office of Field Operations, (202) 927–0765.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 25, 1998, Customs published in the Federal Register (63 FR 51283) T.D. 98–74 which adopted as a final rule, with some changes, proposed amendments to the Customs Regulations regarding the obligation of the owner, master, pilot, operator, or agent of an arriving carrier to provide notice to Customs and to a bonded warehouse of

the presence of merchandise or baggage that has remained at the place of arrival or unlading beyond the time period provided by the regulatory amendments (that is, the fifteenth calendar day after landing) without entry having been completed. The final regulatory texts specifically require one of the arriving carrier's obligated parties, or any party who takes custody from the arriving carrier under a Customs-authorized permit to transfer or in-bond entry, to provide notice of the unentered merchandise or baggage to Customs and to a bonded warehouse no later than 20 calendar days after landing or after receipt under the permit to transfer or after arrival at the port of destination. The notice to the bonded warehouse proprietor initiates his obligation to arrange for transportation and storage of the unentered merchandise or baggage at the risk and expense of the consignee. The final regulatory texts also provide for penalties or liquidated damages against the owner or master of any conveyance, or agent thereof, for failure to provide the required notice to Customs or to a bonded warehouse proprietor. The final regulations further provide for the assessment of liquidated damages against any party who accepts custody of the merchandise or baggage under a Customs-authorized permit to transfer or in-bond entry and who fails to notify Customs and a bonded warehouse of the presence of such unentered merchandise or baggage and also against the warehouse operator who fails to take required possession of the merchandise or baggage.

The final regulatory texts as summarized above resulted from amendments to the underlying statutory authority effected by sections 656 and 658 contained within the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057) and are primarily reflected in a revised § 4.37 (19 CFR 4.37) and in new §§ 122.50 and 123.10 (19 CFR 122.50 and 123.10), each of which is entitled "[g]eneral order." (T.D. 98–74 also included a number of conforming changes to the Customs Regulations in order to reflect a number of other statutory amendments and repeals effected by the Customs Modernization provisions and in order to reflect the recent recodification and reenactment of title 49, United States Code; the correction contained in this document bears no relationship to those other regulatory amendments.)

Although T.D. 98–74 also included a number of conforming regulatory changes to ensure consistency with the terms of revised § 4.37 and new §§ 122.50 and 123.10 (involving, for example, the removal or replacement of obsolete references to a "5-day" or "lay order" period or "extension" thereof), § 144.41(g) of the Customs Regulations (19 CFR 144.41(g)) was overlooked in this regard. This provision concerns the treatment of merchandise in a rewarehouse context. The present text, by referring to a rewarehouse entry not filed "before the expiration of 5 days after its arrival or any authorized extension," is inconsistent with, and thus could give rise to uncertainty regarding the proper and intended applicability of, §§ 4.37, 122.50 and 123.10 in a rewarehouse

context. Therefore, T.D. 98–74 should have included an appropriate revision of § 144.41(g) to clarify the operation of those general order provisions in that specific context. This document corrects this oversight.

CORRECTION OF PUBLICATION

In the document published in the Federal Register as T.D. 98–74 on September 25, 1998 (63 FR 51283), on page 51290, in the third column, the following Part 144 amendment is added in appropriate numerical order:

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The authority citation for Part 144 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1484, 1557, 1559, 1623, 1624.

* * * * * * *

2. In § 144.41, paragraph (g) is revised to read as follows:

§ 144.41 Entry for rewarehouse.

* * * * * * *

(g) *Failure to enter.* If the rewarehouse entry is not filed within 15 calendar days after its arrival, the merchandise shall be disposed of in accordance with the applicable procedures in § 4.37 or § 122.50 or § 123.10 of this chapter. However, merchandise sent to a general order warehouse shall not be sold or otherwise disposed of as unclaimed until the expiration of the original 5-year period during which the merchandise may remain in warehouse under bond.

* * * * * * *

Dated: March 26, 1999.

JOHN A. DURANT,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, March 31, 1999 (64 FR 15302)]

(T.D. 99–30)

SYNOPSES OF DRAWBACK RULINGS

The following are synopses of drawback rulings approved June 1, 1998, to July 29, 1998, inclusive, pursuant to Subparts A & B, Part 191 of the Customs Regulations.

In the synopses below are listed for each drawback ruling approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded to or approved by, the date on which it was approved and the ruling number.

Dated: March 24, 1999.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Ampex Corp.
Articles: Magnetic particle tape cartridges
Merchandise: Metal particle tape
Application signed: January 5, 1998
Ruling forwarded to PD of Customs: San Francisco, June 1, 1998
Ruling: 44–05470–000
Revoked: T.D. 89–19–B

(B) Company: Beaulieu Group, LLC (successor to Beaulieu of America, Inc., under 19 U.S.C. 1313(s))
Articles: Nylon staple fiber a/k/a nylon fiber; polypropylene staple fiber a/k/a polypropylene fiber; nylon yarn a/k/a nylon filament a/k/a nylon filament yarn a/k/a bulk continuous filament; polypropylene yarn a/k/a polypropylene filament a/k/a polypropylene filament yarn a/k/a bulk continuous filament; woven carpet backing a/k/a woven fabric of synthetic yarn
Merchandise: Nylon resin a/k/a nylon polymer; polypropylene resin a/k/a polypropylene polymer
Application signed: January 28, 1998
Ruling forwarded to PDs of Customs: Chicago, New York & Miami, July 24, 1998
Ruling: 44–05524–000

(C) Company: Chem-Fleur, Inc.
Articles: Ester-beta C16
Merchandise: Aldehyde beta C14; dimethyl malonate
Application signed: March 16, 1998
Ruling forwarded to PD of Customs: New York, June 8, 1998
Ruling: 44–05479–000

(D) Company: Chemdal Corp.
Articles: Superabsorbent polymers (SAP) (polyacrylate resins)
Merchandise: Glacial acrylic acid; ethylene glycol diglycidyl ether (EGDGE)
Application signed: March 31, 1998
Ruling forwarded to PD of Customs: New Orleans, June 19, 1998
Ruling: 44–05491–000

(E) Company: Chevron USA, Inc.
Articles: Lubricating oils
Merchandise: OLOA 270–AMSA; OLOA 270–Europe; OLOA 6112; OLOA 270M
Application signed: April 14, 1998
Ruling forwarded to PD of Customs: Houston, July 8, 1998
Ruling: 44–05481–000

(F) Company: Ciba Specialty Chemicals Corp. (successor to Ciba-Geigy Corp.'s T.D. 97–12–I under 19 U.S.C. 1313(s))
Articles: Brightener intermediates (DAS); paper brighteners; detergent brighteners; paper dyes
Merchandise: p-nitrotoluene (PNT)
Application signed: October 7, 1997
Ruling forwarded to PD of Customs: New York, June 17, 1998
Ruling: 44–05490–000

(G) Company: CREANOVA Inc.
Articles: Colorants
Merchandise: Emulsifier WN; Hostapal BV Conc; Laropal A 81
Application signed: January 21, 1998
Ruling forwarded to PD of Customs: New York, July 24, 1998
Ruling: 44–05523–000

(H) Company: The Dow Chemical Co.
Articles: Tungsten carbide
Merchandise: Tungsten trioxide
Application signed: September 25, 1997
Ruling forwarded to PD of Customs: Houston, June 1, 1998
Ruling: 44–05476–000

(I) Company: The Dow Chemical Co.
Articles: Propylene, polymer grade; propane
Merchandise: Propylene, chemical and refinery grades
Application signed: March 5, 1998
Ruling forwarded to PD of Customs: Houston, June 2, 1998
Ruling: 44–05473–000

(J) Company: The Dow Chemical Co.
Articles: Compounded polycarbonate resins: PULSE; CALIBRE; SABRE
Merchandise: Bisphenol-A a/k/a Parabis
Application signed: January 22, 1998
Ruling forwarded to PD of Customs: Houston, July 10, 1998
Ruling: 44–05506–000

(K) Company: The Dow Chemical Co.
Articles: Polycarbonate resins
Merchandise: Bisphenol-A
Application signed: November 20, 1997
Ruling forwarded to PD of Customs: Houston, July 22, 1998
Ruling: 44–05518–000

(L) Company: Eastman Chemical Co. (successor to Eastman Kodak Co. under 19 U.S.C. 1313(s))
Articles: Texanol (TXOL); texanol isobutyrate (TXIB); trimethyl pentane diol (TMPD); isobutyr isobutyrate (IBIB)
Merchandise: Isobutyraldehyde (IHBU); metaux speciaux sodium; iso-butanol
Application signed: March 18, 1998
Ruling forwarded to PD of Customs: Houston, June 1, 1998
Ruling: 44–05478–000

(M) Company: Eastman Chemical Co. (successor to Eastman Kodak Co. under 19 U.S.C. 1313(s))
Articles: Propylene; ethylene
Merchandise: Propane, Class IV
Application signed: December 3, 1997
Ruling forwarded to PD of Customs: Houston, June 1, 1998
Ruling: 44–05477–000

(N) Company: Eastman Chemical Co. (successor to Eastman Kodak Co. under 19 U.S.C. 1313(s))
Articles: Cellulose acetate tow
Merchandise: Methanol; acetone
Application signed: April 2, 1998
Ruling forwarded to PDs of Customs: Boston & Houston, June 15, 1998
Ruling: 44–05488–000

(O) Company: Eastman Chemical Co. (successor to Eastman Kodak Co. under 19 U.S.C. 1313(s))
Articles: Purified terephthalic acid (PTA)
Merchandise: Paraxylene
Application signed: April 2, 1998
Ruling forwarded to PD of Customs: Houston, June 15, 1998
Ruling: 44–05489–000

(P) Company: Eastman Chemical Co.
Articles: 2-acetoacetoxy ethyl methacrylate (AAEM)
Merchandise: Hydroxyethyl methacrylate (HEMA)
Application signed: April 20, 1998
Ruling forwarded to PD of Customs: Houston, June 24, 1998
Ruling: 44–05494–000

(Q) Company: Eastman Kodak Co.
Articles: Sensitized photographic film in rolls; finished sensitized photographic film in cassettes
Merchandise: Polyethylene naphthlate (PEN) film base
Application signed: March 23, 1998
Ruling forwarded to PD of Customs: Boston, July 23, 1998
Ruling: 44–05521–000

(R) Company: Fitel Lucent Technologies
Articles: Fiber optic cable
Merchandise: Optical fiber
Application signed: March 9, 1998
Ruling forwarded to PD of Customs: New York, July 22, 1998
Ruling: 44–05519–000

(S) Company: Formosa Plastics Corp., U.S.A.
Articles: Ethylene dichloride (EDC); vinyl chloride monomer (VCM)
Merchandise: Ethylene; ethylene dichloride
Application signed: May 17, 1998
Ruling forwarded to PD of Customs: Houston, July 22, 1998
Ruling: 44–05522–000

(T) Company: Milliken and Co.
Articles: Textured yarns a/k/a manufactured yarn; partially oriented yarns (POY); space dyed, spun and air-entangled yarns; woven, knit and warp knit fabrics
Merchandise: Nylon yarn a/k/a nylon filament yarn a/k/a bulk continuous filament; polyester yarn a/k/a polyester filament yarn; polypropylene yarn a/k/a olefin yarn a/k/a polypropylene filament yarn; nylon and polyester staple fibers
Application signed: November 26, 1997
Ruling forwarded to PD of Customs: PDs of Customs: Chicago, New York & Miami, June 10, 1998
Ruling: 44–05483–000
Revoked: T.D. 90–84–Q

(U) Company: Pfizer Inc.
Articles: Sulbactam sodium non-sterile
Merchandise: 6-aminopenicillanic acid a/k/a 6-APA
Application signed: April 22, 1998
Ruling forwarded to PD of Customs: New York, July 29, 1998
Ruling: 44–05528–000

(V) Company: Precision Components International, Inc.
Articles: Aircraft engine airfoils
Merchandise: Titanium alloy in barstock form
Application signed: December 23, 1997
Ruling forwarded to PDs of Customs: Boston & New York, July 22, 1998
Ruling: 44–05520–000

(W) Company: Titanium Hearth Technologies, Inc.
Articles: Titanium ingots, slabs and mill products such as billet, bar, sheet, strip, skelp, tube, etc.
Merchandise: Titanium sponge; titanium scrap; titanium ingot
Application signed: September 2, 1997
Ruling forwarded to PD of Customs: New York, June 18, 1998
Ruling: 44–05486–000
Revoked: T.D. 93–5–E

(X) Company: Troy Chemical Corp.
Articles: Troysan Ex products
Merchandise: Propargyl alcohol; N-butyl isocyanate
Application signed: December 23, 1997
Ruling forwarded to PD of Customs: New York, July 22, 1998
Ruling: 44–05493–000

(Y) Company: United Technologies Corp.
Articles: Aircraft engine disks and airfoils
Merchandise: Titanium alloys in mult and barstock form
Application signed: October 10, 1997
Ruling forwarded to PDs of Custom: New York & Boston, July 22, 1998
Ruling: 44–05516–000

(Z) Company: Unitex Chemical Corp.
Articles: Ortho/para toluenesulfonamide-formaldehyde resin (a/k/a Uniplex 600, Ketjenflex MH)
Merchandise: Ortho para toluenesulfonamide (a/k/a OPTSA 30/70)
Application signed: May 22, 1998
Ruling forwarded to PD of Customs: Miami, June 1, 1998
Ruling: 44–05475–000

(T.D. 99–31)

TUNA FISH—TARIFF-RATE QUOTA

THE TARIFF-RATE QUOTA FOR CALENDAR YEAR 1999, ON TUNA CLASSIFIABLE UNDER SUBHEADING 1604.14.20, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (HTSUS).

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity for tuna for Calendar Year 1999.

SUMMARY: Each year the tariff-rate quota for tuna fish described in subheading 1604.14.20, HTSUS, is based on the United States canned tuna production for the preceding calendar year. This document sets forth the quota for calendar year 1999.

EFFECTIVE DATES: The 1999 tariff-rate quota is applicable to tuna fish entered, or withdrawn from warehouse, for consumption during the period January 1, through December 31, 1999.

FOR FURTHER INFORMATION CONTACT: Cynthia Porter, Chief, Quota, Import Operations, Trade Compliance, Office of Field Operations, U.S. Customs Service, Washington, D.C. 20229, (202) 927–5399.

BACKGROUND

It has now been determined that 32,697,510 kilograms of tuna may be entered for consumption or withdrawn from warehouse for consumption during the Calendar Year 1999, at the rate of 6 percent ad valorem under subheading 1604.14.20, HTSUS. Any such tuna which is

entered, or withdrawn from warehouse, for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent ad valorem under subheading 1604.14.30 HTSUS.

Dated: March 24, 1999.

RAYMOND W. KELLY,
Commissioner.

[Published in the Federal Register, April 1, 1999 (64 FR 15870)]

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19 CFR Part 4

(T.D. 99–32)

ADDITION OF BRAZIL TO THE LIST OF NATIONS ENTITLED TO RECIPROCAL EXEMPTION FROM THE PAYMENT OF SPECIAL TONNAGE TAXES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include Brazil in the list of nations whose vessels are entitled to reciprocal exemption from the payment of special tonnage taxes and light money. Brazil was recently removed from the list because the Department of State had informed Customs that Brazil had implemented a law discriminating against U.S. vessels in its preferential tax treatment of cargoes carried on certain specially-registered Brazilian vessels. However, the Department of State now informs Customs that recent actions by the Brazilian government have effectively eliminated this discriminatory tax treatment; thus, Brazil now qualifies for the exemption. Accordingly, Customs is restoring the exemption privileges to vessels of Brazil.

EFFECTIVE DATE: This amendment is effective, and the reciprocal privileges are restored to all Brazilian-registered vessels, as of March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, Entry Procedures and Carriers Branch, (202–927–2320).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton denominated "light

money," on all foreign vessels which enter U.S. ports (46 U.S.C. App. 121 and 128).

Vessels of a foreign nation, however, may be exempted from the payment of such special tonnage taxes and light money upon presentation of satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on U.S. vessels or their cargoes (46 U.S.C. App. 141).

The list of nations whose vessels have been found to be reciprocally exempt from the payment of any higher tonnage duties than are applicable to vessels of the U.S. and from the payment of light money is found at § 4.22, Customs Regulations (19 CFR 4.22). Nations granted these commercial privileges that subsequently impose discriminatory duties are subject to retaliatory suspension of the exemption from payment of special tonnage tax and light money (46 U.S.C. App. 141).

Brazil had previously been included in the list of nations in § 4.22 whose vessels are exempt from the payment of special tonnage taxes and light money (see T.D. 95–14, 60 FR 6966, dated February 6, 1995). However, Brazil was recently removed from the list because the Department of State had informed Customs that Brazil had enacted a law that discriminated against U.S. vessels and the vessels of other countries in its preferential tax treatment of cargoes carried by certain specially-registered Brazilian vessels (see T.D. 98–79, 63 FR 52967, dated October 2, 1998). Specifically, under that law, the dutiable value of imported merchandise carried by the specially-registered Brazilian vessels did not include freight charges, while identical imports carried by U.S. vessels or the vessels of other countries were subject to duty on freight charges. This violated the reciprocal nature of the exemption privilege granted, and, as such, Brazil no longer qualified for the exemption.

However, the Department of State has now informed Customs that the Brazilian government has since effectively eliminated the discriminatory tax treatment in question and that both the Department of State and the Department of Transportation's Maritime Administration support the restoration of Brazil to the list of nations whose vessels are exempt from the payment of special tonnage taxes and light money.

As a result, the Department of State, in accordance with 46 U.S.C. App. 141 and Executive Order 10289 of September 17, 1951 (16 FR 9499, 3 CFR 1949–1953 Comp. p. 787, as amended, see 3 U.S.C.A. 301 note), has recommended to the Secretary of the Treasury, through Customs, that Brazil be restored to the list of nations in § 4.22.

FINDING

The Customs Service has determined that the vessels of Brazil are exempt from the payment of special tonnage taxes and light money, effective as of March 31, 1999, and that § 4.22 of the Customs Regulations should be amended accordingly. The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

THE REGULATORY FLEXIBILITY ACT, EXECUTIVE ORDER 12866 AND INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment concerns a foreign affairs function of the United States, merely implements a statutory mandate, and involves a matter in which the general public has no significant interest, pursuant to 5 U.S.C. 553, notice and public procedure in this case are considered unnecessary; further, for the same reason, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Nor does the amendment meet the criteria for a "significant regulatory action" under E.O. 12866.

LIST OF SUBJECTS IN 19 CFR PART 4

Cargo vessels, Customs duties and inspection, Entry, Maritime carriers, Vessels.

AMENDMENT TO THE REGULATIONS

Part 4, Customs Regulations (19 CFR part 4), is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general and relevant specific authority citations for part 4 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91.

* * * * * * *

Section 4.22 also issued under 46 U.S.C. App. 121, 128, 141;

* * * * * * *

2. Section 4.22 is amended by adding "Brazil", in appropriate alphabetical order, to the list of nations entitled to exemption from special tonnage taxes and light money.

Dated: March 26, 1999.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, March 31, 1999 (64 FR 15301)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 31, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF THE CHEMICAL COMPOUND "LUTEINIZING HORMONE-RELEASING HORMONE"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter and treatment relating to the classification of the chemical compound "Luteinizing Hormone-Releasing Hormone."

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling, and any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of the chemical compound "Luteinizing Hormone-Releasing Hormone," under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before May 14, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings,

Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of the chemical compound "Luteinizing Hormone-Releasing Hormone." Although in this notice Customs is specifically referring to one ruling, Headquarters Ruling Letter (HQ) 951974, dated October 8, 1992, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a

third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In HQ 951974, Customs ruled that luteinizing hormone-releasing hormone (LH-RH) was classified under subheading 2937.10.00, HTSUS, the provision for pituitary (anterior) or similar hormones and their derivatives. This ruling is set forth as Attachment A to this document.

Upon review of this ruling, Customs has discovered an error in the classification of LH-RH. This product should have been classified in subheading 2937.99.95, HTSUS, the residual provision for hormones not classified elsewhere.

LH-RH is a neurohumoral hormone produced in the hypothalamus. Upon release, it causes the pituitary gland to release luteinizing hormone and follicle stimulating hormone, hormones which control development in children and fertility in adults. *Complete Drug Reference*, 1997 Ed., United States Pharmacopeia; *Merck Index* 12th ed. As a hormone, LH-RH must be classified in one of the three subheadings of heading 2937, HTSUS: pituitary hormones, adrenal cortical hormones, or other. Inasmuch as it is produced in the hypothalamus, LH-RH is not properly classified as a pituitary hormone. Neither is LH-RH properly classified as an adrenal cortical hormone, thus it belongs in the residual provision. Within the residual provision, LH-RH is best classified in subheading 2937.99.95, HTSUS, as "other: other" because it is neither insulin nor an estrogen and it is not otherwise specifically provided for by an *eo nomine* provision in subheading 2937.99.

Customs proposes to revoke HQ 951974 to reflect the proper classification of LH-RH. Proposed Headquarters Ruling Letter (HQ) 962219, revoking HQ 951974, is set forth as Attachment B to this document.

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 30, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, October 8, 1992.

CLA-2 CO:R:C:F 951974 EAB
Category: Classification
Tariff No. 2933.90.8000 and 2937.10.0000

DEANNE BENOVITZ, PH.D.
PEPTIDES INTERNATIONAL, INC.
P.O. Box 24658
Louisville, KY 40224

Re: Polypeptides; hormones; Endothelin–1 (Human) CAS# 117399–94–7, Endothelin–3 (Human) CAS# 117399–93–6, Big Endothelin–1 (Human) CAS# 122462–75–3, LH-RH (Leuteinizing Hormone Releasing Hormone) CAS# 71447–49–9; GRF (Human) CAS# 83930–13–6; NY 872718 affirmed.

DEAR DR. BENOVITZ:

This is in reply to your letter dated June 4, 1992, in which you request, first, review of NY 872718 (April 10, 1992) concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of several chemicals identified therein pursuant to your correspondence dated March 10, 1992, and, second, the classification of certain other chemicals.

Facts:

In NY 872718, Customs classified Endothelin–1 (Human) CAS# 117399–94–7, Endothelin–2 (Human) CAS# unknown, Endothelin–3 (Human) CAS# 117399–93–6, Big Endothelin–1 (Porcine) CAS# unknown and Big Endothelin–1 (Human) CAS# 122462–75–3, all of which are polypeptides, under subheading 2933.90.3700, HTSUSA, which provides for other heterocyclic compounds with nitrogen hetero-atom(s) only: products described in additional U.S. note 3 to section VI, dutiable at the column 1 general rate of 13.5 percent.

You presently seek review of the classification of Endothelin–1 (Human), Endothelin–3 (Human) and Big Endothelin–1 (Human) as well as a binding ruling on the classification of LH-RH (Leuteinizing Hormone Releasing Hormone) CAS# 71447–49–9 and GRF (Human) CAS# 83930–13–6, the latter two chemicals also being polypeptides.

You are of the opinion that all of the foregoing chemicals are properly classifiable under heading 2937 as hormones.

Issue:

What is the classification under the HTSUSA of polypeptides identified as Endothelin–1 (Human) CAS# 117399–94–7, Endothelin– 3 (Human) CAS# 117399–93–6, Big Endothelin–1 (Human) CAS# 122462–75–3, LH-RH (Leuteinizing Hormone Releasing Hormone) CAS# 71447–49–9 and GRF (Human) CAS# 83930–13–6?

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUSA. The tariff classification of merchandise under the HTSUSA is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRI's taken in order.

Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System represent the official interpretation of the Customs Cooperation Council on the scope of each heading, and, although neither binding upon the contracting parties to the Harmonized System Convention nor considered to be dispositive interpretations, they should be consulted on the proper scope of the System.

Heading 2937, HTSUSA, provides for "hormones, natural or reproduced by synthesis; derivatives thereof, used primarily as hormones; other steroids used primarily as hormones."

EN 29.37 indicates that chemicals classifiable under heading 2937 are such substances as are secretions usually of the endocrine glands of humans or animals, but which also may originate either in glands which are both endo- and exocrinal or in various cellular tissues. Such "hormones", naturally occurring or reproduced by synthesis, are capable of inhibiting or stimulating the functioning of particular organs.

We find that only one substance, *i.e.* LH-RH, meets the functional definition of "hormone" and is, therefore classifiable under heading 2937.

We find that none of the remaining chemicals at issue is described under heading 2937 inasmuch as no evidence has been provided in your submission, nor have Customs laboratory and scientific services personnel found support for the proposition, that any of the substances are capable of inhibiting or stimulating the functioning of particular organs.

Heading 2933 describes in part heterocyclic compounds with nitrogen hetero-atom(s) only, and we find the remaining polypeptides classifiable thereunder.

Holding:

LH-RH (Leuteinizing Hormone Releasing Hormone) CAS# 71447–49–9 is classifiable under subheading 2937.10.0000, HTSUSA, a provision for hormones, natural or reproduced by synthesis; derivatives thereof, used primarily as hormones; other steroids used primarily as hormones; pituitary (anterior) or similar hormones, and their derivatives, and dutiable at the column 1 general rate of 1.8 percent ad valorem.

Endothelin–1 (Human) CAS# 117399–94–7, Endothelin–3 (Human) CAS# 117399–93–6, Big Endothelin–1 (Human) CAS# 122462–75–3 and GRF (Human) CAS# 83930–13–6 are classifiable under subheading 2933.90.8000, HTSUSA, a provision for heterocyclic compounds with nitrogen hetero-atom(s) only; nucleic acids and their salts; other; aromatic or modified aromatic; other; other: products described in additional U.S. note 3 to section VI, and dutiable at the column one general rate of 13.5 percent ad valorem. Please note that this provision was renumbered from 2933.90.3700 to the present 2933.90.8000.

NYRL 872718 is affirmed.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 962219 MGM
Category: Classification
Tariff No. 2937.99.95

DEANNE BENOVITZ, PH.D.
PEPTIDES INTERNATIONAL, INC.
P.O. Box 24658
Louisville, KY 40224

Re: Luteinizing hormone-releasing hormone (CAS # 71447–49–9); HQ 951974 revoked.

DEAR DR. BENOVITZ:

This office has determined that Headquarters Ruling Letter (HQ) 951974, issued to you on October 8, 1992, concerning the tariff classification of several biologically active chemical compounds, is in error as to the classification of luteinizing hormone-releasing hormone (LH-RH). In HQ 951974, Customs ruled that LH-RH would be properly classified under subheading 2937.10.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for pituitary (anterior) or similar hormones, and their derivatives. Upon further review of HQ 951974, Customs has discovered an error in the classification of LH-RH. This product should have been classified in subheading 2937.99.95, HTSUS which provides for other hormones and their derivatives * * *: other: other.

As the classification of LH-RH specified in HQ 951974 is in error, it is revoked for the reasons set forth in this ruling. It is noted that in HQ 952784, issued to you on March 8, 1993, HQ 951974 was modified as it pertained to the classification of the described chemical compounds other than LH-RH.

Facts:

LH-RH, also known as gonadorelin, is a hormone produced in the hypothalamus which stimulates the secretion of the pituitary hormones luteinizing hormone (LH) and follicle-stimulating hormone (FSH). *The Merck Index*, 12th ed. LH-RH is a decapeptide, that is, it contains ten amino acid residues and has the formula $C_{55}H_{75}N_{17}O_{13}$. LH-RH hydrochloride is used in evaluating hypothalmic-pituitary gonadotropic function. *The Physician's Desk Reference*, 1997, at 2996.

Issue:

Whether LH-RH is classified in subheading 2937.10.00, HTSUS, the provision for pituitary (anterior) or similar hormones, and their derivatives or in subheading 2937.99.95, HTSUS, the residual provision.

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

This matter is governed by GRI 6, in that the choice in classification is between two subheadings within heading 2937, HTSUS. Subheading 2937.10.00, HTSUS, provides for "pituitary (anterior) or similar hormones, and their derivatives" while subheading 2937.99.95, HTSUS, provides for "other hormones and their derivatives * * *: other: other." LH-RH is a neurohumoral hormone produced in the hypothalamus. Upon release, it causes the pituitary gland to release luteinizing hormone and follicle stimulating hormone, hormones which control development in children and fertility in adults. *Complete Drug Reference*, 1997 Ed., United States Pharmacopeia; *Merck Index* 12th ed. As a hormone, LH-RH must be classified in one of the three subheadings of heading 2937, HTSUS: pituitary hormones, adrenal cortical hormones, or other. Inasmuch as it is produced in the hypothalamus, LH-RH HCl is not properly classified as a pituitary hormone. Nor is LH-RH properly classified as an adrenal cortical hormone, thus it falls in the residual provision. Within the residual provision, LH-RH is best classified in subheading 2937.99.95, HTSUS, as "other: other" because it is neither insulin nor an estrogen and it is not otherwise specifically provided for by an *eo nomine* provision in subheading 2937.99.

This is consistent with HQ 960397, dated July 30, 1998, which classified the luteinizing hormone-releasing hormone (hydrochloride salt), LH-RH HCl (CAS # 51952–41–1), as an other: other: other hormone of subheading 2937.99.95, HTSUS.

Holding:

Luteinizing hormone-releasing hormone is properly classified in subheading 2937.99.95, HTSUS.

HQ 951974 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF MICROWAVABLE BODY PADS/BACK WARMERS, POCKET WARMERS AND COMFORT WRAPS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter, and treatment relating to the classification of microwavable body pads/back warmers, pocket warmers and comfort wraps.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification under the Harmonized Tariff Schedule of the United States (HTSUS) of microwavable body pads/back warmers, pocket warmers and comfort wraps ("microwavable articles") and any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before May 14, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Richard Romero, Attorney-Advisor, Office of Regulations and Rulings at 202–927–2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out

import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of certain microwavable articles. Customs has undertaken reasonable efforts to search existing data bases for rulings, in addition to the one identified. Although in this notice Customs is specifically referring to one ruling, Headquarters Ruling (HQ) 957182, dated March 6, 1995, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to modify any treatment which it previously accorded to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to this notice.

HQ 957182, dated March 6, 1995, set forth as "Attachment A" to this document, addressed the classification under the HTSUS of three microwavable articles of merchandise each comprising two distinct items: an energy pack and a textile pouch. Customs determined that (1) the energy pack was classified in subheading 2712.20, HTSUS, which provides for "paraffin wax;" and (2) the textile pouches imported without the energy packs were classified in subheading 6307.90.9989, HTSUS, as "other made-up articles."

The energy pack contains an emulsion consisting primarily of water, paraffin wax, and an emulsifying agent. Additionally, the emulsion contains an antibacterial agent which retards putrification of the mixture. When the energy pack is heated in a microwave oven, it is the water, not the wax component, which is heated by the microwaves. As the water reaches 50 degrees Celsius, the wax melts and absorbs a significant amount of energy. As the wax cools, it releases stored energy slowly. During this phase, the energy pack can be inserted into a textile pouch

and wrapped around the body to provide warmth. The textile pouch serves only as a means by which the energy pack can be affixed to the body.

HQ 957182 was based upon an "essential character" analysis (pursuant to General Rule of Interpretation 3(b), HTSUS) of each component of the article. We determined that the articles took their essential character and classification from the paraffin wax component, which is a material of heading 2712, HTSUS. Heading 2712, HTSUS, covers "materials." However, the merchandise is not a "material" but an "article" or "good." Heading 2712, HTSUS, provides for wax as a material, but not for articles of wax. For this reason, heading 2712, HTSUS, should not have been considered. Rather, we now believe that the energy pack is properly classified by application of GRI 1, in subheading 3824.90, HTSUS, as "other chemical products and preparation of the chemical or allied industries." Classification of the textile pouches imported without the energy packs remains in subheading 6307.90.9989, HTSUS, as "other made-up articles."

Upon further consideration of this matter, pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify HQ 957182, and revoke any other Customs ruling that may exist which has not been specifically identified, to reflect the proper classification of the microwavable articles pursuant to the analysis set forth in proposed HQ 959825. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to modify any treatment which it previously accorded to substantially identical transactions. Consideration will be given to any written comments timely received. Proposed HQ 959825 is set forth as "Attachment B" to this document. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 25, 1999.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, March 6, 1995.

CLA–2 CO:R:C:M 957182 KCC
Category: Classification
Tariff No. 2712.20.00 and 6307.90.9989

TERESA A. GLEASON, ESQ.
BAKER & MCKENZIE
815 Connecticut Avenue, N.W.
Washington, DC 20006–4078

Re: Body Pad/Back Warmer, Pocket Warmer, and Comfort Wrap; textile jacket; microwavable energy pack; wax; GRI 3(b); composite good; essential character; EN Rule 3(b); HRL 956845; HRL 083349; HRL 087501; 3926.90.95; EN 39.26; other articles of plastics and articles of other materials of headings 3901 to 3914; other made up articles.

DEAR MS. GLEASON:

This is in regards to your letters dated August 26, and October 14, 1994, on behalf of R.G. Barry Corporation, to Customs in New York, concerning the tariff classification of a body pad/back warmer, pocket warmer, and comfort wrap under the Harmonized Tariff Schedule of the United States (HTSUS). A sample of each article and a copy of the front, back and side panels of the prototype box for the body pad/back warmer were submitted for our examination.

Facts:

Each of the articles contains a microwaveable energy pack which, when heated, is designed to keep a part of the body, *i.e.* hands, back, arms, etc., warm for an extended period of time. The articles at issue are described as follows:

1. The body pad/back warmer consists of a 10¾ x 7¼ inch energy pack that is inserted into a textile pouch. The textile pouch has a belt mechanism, so that the body pad/back warmer can be wrapped around or secured to the body part to be warmed.
2. The pocket warmer consists of a 5¼ x 2¾ inch pink energy pack that is inserted into a textile pouch. It is designed to be placed into a pocket to keep the hands warm.
3. The comfort wrap consists of the 10¾ x 7¼ inch energy pack and a 100% acrylic knit pouch with a polyester foam and nylon knit lining measuring 12 x 5½ inches. A 89% nylon and 11% spandex sleeve is attached to one side of the textile pouch. A velcro belt made of polyproylene will be attached to the opposite side of the pouch. The sleeve and velcro belt are used to secure the comfort wrap to a particular area of the body.

The energy packs for the body pad/back warmer and comfort wrap consist of plastic foam, wax, water, small amounts of emulsifying agents and anti-bacterial agents sealed in plastic. The energy pack for the pocket warmer is slightly different in that it consists of plastic shell filled with silica sand, paraffin wax and a non-toxic coloring agent to make the silica sand granules pink. The energy packs are designed to be placed in a microwave oven where the Water or sand is heated by the microwaves to raise the temperature of the energy pack. The wax component is not heated by microwave energy; it is heated through contact with the heated water or sand. When the wax is heated by the water or sand above approximately 50° Celsius, it melts and absorbs a significant amount of energy. During use, the wax solidifies, slowly releasing its heat energy.

You have provided the following breakdown figures for the various energy packs:

Component	*Cost*	*Weight (Oz.)*
Pocket Warmer Pack		
Energy Pack	$.92	3 total
Temperature Strip	$.14	"
Body & Comfort Pad Pack		
Liquid Emulsion	$.67	19
Clear Outer Coex Bag	$.21	.5 total for all
White Inner Coex Bag	$.19	components
Form	$.09	"
Temperature Strip	$.14	"

You state that the U.S. Food and Drug Administration (the FDA) has informally confirmed that the body pad/back warmer, comfort wrap and pocket warmer do not fall under the jurisdiction of the FDA. You cite to the Federal Food, Drug and Cosmetic Act which applies to medical devices, *i.e.*, instruments which affect the "structure or function of the body" or are "intended for use in the * * *cure, mitigation, treatment, or prevention of disease." 21 U.S.C. section 321(h). You state that the FDA considers heating pads to be medical devices when claims are made that they will cure or mitigate a medical condition, *e.g.*, "soothes sore muscles" or "lessens pain due to arthritis." You state that R.G. Barry will assert *no* such claims, but will emphasize that its thermal products provide "warmth" or "soothing warmth."

Issue:

1. What is the tariff classification of the body pad/back warmer, pocket warmer and comfort wrap under the HTSUS?
2. What is the tariff classification of the body pad/back warmer and pocket warmer imported without the energy pack under the HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

When, by application of GRI 2, HTSUS, goods are *prima facie* classifiable under two or more headings, GRI 3, HTSUS, is applicable. In this case, classification is determined by application of GRI 3(b), HTSUS, which provides:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them the essential character, insofar as this criterion is applicable.

Coding System (HCDCS) Explanatory Notes (Ens) may be consulted. The ENs, although not dispositive, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See,* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989). EN Rule 3(b)(XI)(pg. 4) states that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts (emphasis in original).

We are of the opinion that the body pad/back warmer, pocket warmer and comfort warmer are composite goods because the components are adapted one to the other, mutually complementary, and together form a whole which would not normally be offered for sale in separate pans. *See,* Headquarters Ruling Letter (HRL) 083349 dated June 2, 1989, which classified a warmer consisting of a basket and textile lid and liner, as a composite good; and HRL 087501 dated July 26, 1990, which classified a textile beverage can wrap and plastic freezable insert pack as a composite good. Therefore, to classify these articles, we need to determine which component imparts the essential character.

In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. In addition, EN Rule 3(b) (pg. 4), provides further factors which help determine the essential character of goods. Factors such as bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods are to be utilized, though the importance of certain factors will vary between different kinds of goods.

In HRL 956845 dated December 22, 1994, we classified a wristband headband, hardhat pad and vest made of textile materials with sewn in plastic polymer beads for cooling. Pursuant to GRI 3(b), HTSUS, we determined that these articles were composite goods. With regards to which components imparted the essential character, we stated:

> With respect to each of the instant articles, the textile component gives it its form and provides its means of performance. The cooling effect of the beads cannot be applied to the body of the wearer without the textile article. It is the wearing of the textile

article, as in the case of the wristband, headband, and vest, or the attachment of the textile article to the object worn, as in the case of the hard-hat pad attached to the inside of the hard-hat, that allows the beads to function as intended. Without the made inside of the hard-hat, that allows the beads to function as intended. Without the made up textile article, the beads cannot be put to their intended use. On the other hand, it is the beads that provide the source of the cooling effect. Thus, articles of the instant *kind* have a dual aspect: as a textile article, such as a wristband or vest, and as a cooling mechanism.

The decision as to which component imparts essential character to the articles depends on an examination of the article and its dual aspects. All such articles will be capable of functioning as a cooling mechanism. This, however, does not mean that in all cases the cooling beads will impart essential character. Where the article also functions as a textile article *in the ordinary manner*, the cooling mechanism aspect of the article will *not* be viewed as imparting essential character. Where the textile article does not function in the ordinary manner, and thus appears only to be providing a medium through which the cooling beads are able to perform their intended function, the beads will be viewed as imparting essential character.

We are of the opinion that the rationale in HRL 956845 is applicable the articles under consideration in this case. Based on HRL 956845, the energy packs provide the essential character to each of the articles. Each article has a dual aspect; the energy packs are designed to provide warmth to an object and the textile jackets provide the form and the means of performance. In this case, the textile jackets do not function *in the ordinary manner*; they only provide a medium through which the energy packs are able to perform their warming function. Therefore, the energy packs serve to distinguish each article. Since the energy packs impart the essential character, each article is classified under the tariff provision which provides for the energy pack.

There are two types of energy packs at issue. The energy packs for the body pad/back warmer and comfort wrap consists of plastic foam, wax, water, small mounts of emulsifying agents and anti-bacterial agents sealed in plastic. The energy pack for the pocket warmer is slightly different in that it consists of a plastic shell filled with silica sand, paraffin wax and a non-toxic coloring agent. We are of the opinion that the energy packs are composite goods which, pursuant to GRI 3(b), are classified according to the classification of the component which imparts the essential character to the energy pack. We are of the opinion that the wax imparts the essential character to the energy packs. It is the wax which releases the heat after the energy pack is heated. Wax is classified under subheading 2712.20.00, HTSUS, which provides for:

> Petroleum jelly; paraffin wax, microcrystalline petroleum wax, slack wax, ozokerite, lignite wax, peat wax, other mineral waxes and similar products obtained by synthesis or by other processes, whether or not colored * * * Paraffin wax containing by weight less than 0.75 percent of oil.

Therefore, the body pad/back warmer, pocket warmer and comfort wrap are classified under subheading 2712.20.00, HTSUS, as paraffin wax.

You contend that the articles at issue are classified under subheading 3926.90.95, HTSUS, as other articles of plastics and articles of other materials of headings 3901 to 3914. As evidence of this classification, you cite HRL 087501 which classified a textile beverage can holder with freezable gel packet as a composite good. HRL 087501 held that the textile beverage holder imparted the essential character to the article and, therefore, classified the entire article under subheading 6307.90.9590, HTSUS, as other made up articles, including dress patterns.

Additionally, HRL 087501 stated that the freezable gel packet filled with polyvinyl alcohol was *prima facie* classifiable under heading 3926, HTSUS, as other articles of plastic. This classification was based on EN 39.26 (pg. 576) which stated that "[p]lastic containers filled with carboxymethylcellulose (used as ice-bags)" are classified under heading 3926, HTSUS. The energy packs at issue are not used as ice-bags, or filled with polyvinyl alcohol or carboxymethylcellulose. The energy packs are plastic containers, but they are used for warmth and are filled with either plastic foam, wax, water, small mounts of emulsifying and anti-bacterial agents, or silica sand, paraffin wax and a non-toxic coloring agent. We are of the opinion that they are not of the class or kind of article classifiable under subheading 3926.90.95, HTSUS.

We are of the opinion that the textile jackets for the body pad/back warmer and pocket warmer are classified under subheading 6307.90.9989, HTSUS, which provides for "Other

made up articles, including dress patterns * * * Other * * * Other * * * Other * * * Other * * * Other."

Holding:

Pursuant to GRI 3(b), HTSUS, the body pad/back warmer, pocket warmer and comfort wrap are composite goods with the energy pack imparting the essential character to each article. The energy pack is also a composite good with the wax imparting the essential character. Therefore, each of the articles is classified under subheading 2712.20.00, HTSUS, as paraffin wax. Articles classified under this tariff provision enter the U.S. duty free.

The body pad/back warmer and pocket warmer imported without the energy pack are classified under subheading 6307.90.9989, HTSUS, as other made up articles. The changeable nature of the statistical annotation (the ninth and tenth digits of the classification) categories, you should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 959825 RTR
Category: Classification
Tariff No. 3824.90

TERESA A. GLEASON, ESQ.
BAKER & MCKENZIE
815 Connecticut Avenue, N.W.
Washington, DC 20006–4078

Re: Microwavable body pads/back warmers, pocket warmers and comfort wraps; subheading 2712.20; composite goods; mixtures; HQ 957182 modified.

DEAR MS. GLEASON:

This is in reference to HQ 957182, which was issued to you on March 6, 1994, in response to your letters of August 26 and October 14, 1995, on behalf of R.G. Barry Corporation, regarding the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of microwavable body pads/back warmers, pocket warmers and comfort wraps ("microwavable articles"). As we advised you by letter of March 18, 1998, we have reviewed that ruling and have now determined that the classification of the microwavable articles imported together with energy packs is in error. However, the classification of the articles imported without the energy packs is correct. Therefore, this ruling modifies HQ 957182 only with respect to microwavable articles imported together with the energy packs. Their correct classification is set forth below.

Facts:

In HQ 957182, we identified three microwavable articles, each comprising two distinct items: an energy pack and a textile pouch.

1. a body pad/back warmer, consisting of a 10¾ x 7¼ inch energy pack which is inserted into a textile pouch. The pouch has a belt mechanism, which enables the user to secure the body pad/back warmer to the body to provide warmth;
2. a comfort wrap consisting of the 10¾ x 7¼ inch energy pack and a 100% acrylic knit pouch with a polyester foam and nylon knit lining measuring 12 x 5½ inches; a sleeve (89% nylon and 11% spandex) is attached to one side of the pouch; a velcro belt made of polypropylene is attached to the opposite side of the pouch; the sleeve and velcro belt allow the user to secure the comfort wrap to the body to provide warmth.
3. a pocket warmer consisting of a 5¼ x 2¼ inch pink energy pack that is inserted into the textile pouch. It is designed to be placed into a pocket to keep provide the hands with warmth.

The energy pack of the body pad/back warmer and comfort wrap consists of an off-white polyurethane sheet soaked with a milky emulsion contained in a plastic film pouch. The polyurethane sheet provides integrity to the energy pack and also prevents the emulsion from dispersing to the corners of the pack when the pack is applied to the body. The polyurethane sheet does not play a role in heat retention. The emulsion consists of paraffin wax (solid at room temperature; liquid when heated), and an antibacterial agent (to retard putrification) in water. When the energy pack is heated in a microwave oven, it is the water, not the wax component, which is heated by the microwaves. As the water reaches 50 degrees Celsius, the wax melts and absorbs a significant amount of energy. As the wax cools, it slowly releases stored energy. During this phase, the energy pack can be inserted into a textile pouch and wrapped around the body to provide warmth.

The energy pack of the pocket warmer functions similarly to the energy pack of the body pad/back warmer and body wrap. That is, the paraffin wax contained in the pocket warmer is heated through contact with a medium. However, in the case of the pocket warmer, the medium is not water but silica sand. The microwaves heat silica sand, which in turn melts the paraffin wax. Thereafter, the process by which the stored energy dissipates to provide warmth is identical. In addition to silica sand and paraffin wax, the pocket warmer's energy pack contains a non-toxic coloring agent which renders the sand pink, all of which is contained in a plastic shell.

Issue:

Whether the three articles are classified as a paraffin wax of heading 2712, HTSUS, or as a chemical preparation of heading 3824, HTSUS.

Law and Analysis:

The provisions under consideration are as follows:

2712	Petroleum jelly; paraffin wax, microcrystalline petroleum wax, slack wax, ozokerite, lignite wax, peat wax, other mineral waxes and similar products obtained by synthesis or by other processes, whether or not colored:
2712.20	Paraffin wax containing by weight less than 0.75 percent of oil
* * * * * * *	
3824	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included:
3824.90	Other:
	Other:
	Mixtures containing 5 percent or more by weight of one or more aromatic or modified aromatic substances:
3824.90.28	Other:
	Other:
3824.90.45	Mixtures that are in whole or in part of hydrocarbons derived in whole or in part from petroleum, shale oil or natural gas
* * * * * * *	
6307	Other made up articles, including dress patterns:
6307.90	Other:
	Other:
6307.90.99	Other:
	Other:
6307.90.9989	Other
* * * * * * *	

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Pursuant to GRI 3(b), goods which are *prima facie* classified in two or more headings, and are equally specific in relation to one another, shall be classified as if they

consisted of the material or component which gives them their essential character. As the GRIs must be applied in order, when merchandise is classified under GRI 1, no essential character analysis pursuant to GRI 3(b) is necessary (*Bradford Industries, Inc., v. U.S.*, 968 F. Supp. 732 (1997)).

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

GRI 3 Consideration of the Energy Packs vs the Textile Pouch

The microwavable articles constitute composite goods, consisting of the textile pouch and the energy pack. Each component of the composite good can be classified in a separate heading by reference to GRI 1. Therefore, we must resort to GRI 3 to classify them. GRI 3(a) is inapplicable because the HTSUS provisions under consideration each describes only a single part of the article, and the headings are equally specific in relation to one another. Thus, we must rely on GRI 3(b) and determine from which component the articles take their essential character.

EN Rule 3(b)(VIII) (at page 4) lists the following factors to help determine the essential character of goods: the nature of the materials or components, their bulk, quantity, weight or value, and the role of a constituent material in relation to the use of the goods.

Recently, there have been several Court decisions on "essential character" for purposes of GRI 3(b). *Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265 (CIT 1996), *affirmed* 119 F.3d 969 (Fed. Cir. 1997), involved the classification of shower curtain sets, consisting of an outer textile curtain, inner plastic magnetic liner, and plastic hooks. Customs had classified the sets on the basis of the textile curtain under the "default rule of GRI 3(c)", after determining that neither the relative specificity test nor the essential character test was applicable (119 F.3d at 971). The CIT found that the plastic liner performed the indispensable function of keeping water inside the shower and therefore held that the plastic liner imparted the essential character upon the set. In its decision affirming the CIT decision, the CAFC stated:

> The [CIT] carefully considered all of the facts, and, after a reasoned balancing of all the facts, concluded that Better Home Plastics offered sufficient evidence and argument to overcome the presumption of correctness. The court concluded that the indispensable function of keeping water inside the shower along with the protective, privacy and decorative functions of the plastic liner, and the relatively low cost of the sets *all combined* to support the decision that the plastic liner provided the essential character of the sets. * * * The court's decision did not rely solely, or even hinge, on the indispensability of the water-retaining function. The decision was substantially based on the importance of the other functions as well as the cost of the entire set. [119 F.3d at 971] [Emphasis added]

Other decisions in which the Court looked primarily to the role of the constituent material in relation to the use of the goods to determine essential character include *Mita Copystar America, Inc. v. United States*, 966 F. Supp. 1245 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998), and *Vista International Packaging Co., v. United States*, 19 CIT 868, 890 F. Supp. 1095 (1995).

In HQ 957182, based upon GRI 3(b), we made an "essential character" analysis of each component of the microwavable articles and determined that the articles took their essential character and classification from the energy pack. In considering the roles of the textile pouch and the energy packs, we note that the primary purpose of the microwavable article is to provide warmth (i.e., that is the "indispensable function," *(Better Home Plastics*, supra) of the article). The article is not intended as a means or mechanism for the transport of goods within the textile pouch; the sole purpose of the pouch is to house the energy pack. By contrast, as the energy pack is both receptacle and conduit of energy from the microwave oven, it is necessary for providing warmth. Thus, the textile pouch performs a secondary role to that of the energy pack. Therefore, we affirm that portion of HQ 957182 in which we concluded that the energy pack imparts the essential character to the microwavable articles. However, for the reasons set out below, we do not believe that they can be classified as "paraffin wax" of heading 2712, HTSUS.

An "Article" or "Good" Cannot be Classified in a Provision for "Materials"

The energy packs are mixtures of several different materials, including paraffin wax, water or sand, and an emulsifying agent. In HQ 957182, we classified the energy packs as paraffin wax of heading 2712, HTSUS, which in pertinent part provides for "(p)etroleum jelly; paraffin wax, microcrystalline petroleum wax, slack wax, ozokerite, lignite wax, peat wax, other mineral waxes and similar products obtained by synthesis or by other processes, whether or not colored." The heading text does not provide for **articles** of wax. Paraffin wax is "a hydrocarbon wax extracted from certain distillates of petroleum oils, or of oils obtained from shale or other bituminous minerals" (EN at page 230). Stated more generally, paraffin wax is a **material** obtained from certain minerals. By its terms, a heading providing for such a **material** does not appear to describe an **article** composed of that material. As the energy pack must be regarded as an article or good, heading 2712, HTSUS, does not appear to cover the merchandise.

In this regard, GRI 2(b) specifically addresses the classification of mixtures or combinations:

> Any reference in a heading to a **material** or substance shall be taken to include a reference to **mixtures or combinations** of that material or substance **with other materials** or substances. Any reference to **goods** of a given material or substance shall be taken to include a reference to **goods** consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3. (Emphasis added).

As reflected in ENs X, XI, and XII to GRI 2(b), the effect of this rule is to expand the scope of a reference to a material or substance to include mixtures or combinations of these materials with other materials. It expands the scope of a heading providing for goods of a given material, which are mixed with other materials, to include goods only partially composed of that material. Notably, however, it does *not* expand the scope of a heading providing only for a material to include articles made of that named material. In HQ 957182, we mistakenly classified a good in a heading providing for a material.

The Articles are Goods of Heading 3824 by Application of GRI 1

Heading 3824, HTSUS, provides in part for "chemical products and preparations of the chemical or allied industries." By its terms, it is a residual category that is broad enough to cover mixtures that are put up in a way that renders them fit for a particular application.

The EN to heading 3824, HTSUS, states at page 581 that "(t)he chemical or other preparations are either mixtures ***(of which emulsions and dispersions are special forms)*** or occasionally solutions" (Emphasis added). Therefore, according to the EN, an emulsion is a mixture of heading 3824, HTSUS.

The McGraw-Hill *Encyclopedia of Science & Technology*, 6th Edition, defines an "emulsion" as "[a] dispersion of one liquid in a second immiscible liquid." Further, "[a] stable emulsion consisting of two pure liquids cannot be prepared; to achieve stability, a third component, an emulsifying agent, must be present. Generally the introduction of an emulsifying agent will lower the interfacial tension of the two phases" (vol. 6, p. 309).

As stated above, the energy pack of the microwavable body pads/back warmers and comfort wraps consists of an off-white polyurethane sheet soaked with a milky solution. The solution is a chemical mixture composed of paraffin wax (a hydrocarbon mixture), water, a surfactant and an antibacterial agent. The surfactant changes the surface tension of the wax and water, and allows them to mix, forming a milky solution/emulsion. According to the ENs, "emulsions" are "mixtures." The chemical mixture here is specially formulated to provide a heat source for the article. Therefore, it is more than a mere chemical mixture; it is a "chemical preparation," provided for in heading 3824, HTSUS.

The energy pack of the pocket warmer contains paraffin wax, silica sand (silicon dioxide, chemical formula S_iO_2 (*Webster's New World Dictionary of the American Language*, College Edition)), and a non-toxic coloring agent. This chemical mixture of organic and inorganic chemicals is specially formulated to provide a heat source for the article. Therefore, it is more than a mere chemical mixture; it is a "chemical preparation," provided for in heading 3824, HTSUS.

Based on the available information, we are only able to determine classification to the six digit level. However, if the emulsion contains five percent or more of an aromatic substance, it will be classified in subheading 3824.90.28, HTSUS. If it contains less than five percent, it will be classified in subheading 3824.90.45, HTSUS.

Holding:

Microwavable articles imported together with the energy packs are classifiable in subheading 3824.90, HTSUS, the provision for "prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included: Other."

HQ 957182 is modified as set forth in this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION AND REVOCATION OF CUSTOMS RULING LETTERS AND PRIOR CUSTOMS TREATMENT PERTAINING TO THE DUTIABILITY OF SPARE PARTS UNDER THE VESSEL REPAIR STATUTE

ACTION: Notice of proposed modification and revocation of ruling letters and prior Customs treatment.

SUMMARY: Pursuant to section 625(c)(1) and (2), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)(2)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act (Pub. L. 103–182, 107 Stat. 2057) this notice advises interested parties that Customs intends to modify or revoke ruling letters and prior Customs treatment pertaining to the dutiability of "spare parts" as that term is used in 19 U.S.C. 1466(h)(2) and (3). It is now Customs position that the word "spare" is to be given full force and effect in Customs administration of those statutory provisions. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before May 14, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Entry Procedures and Carriers Branch, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Glen E. Vereb, Entry Procedures and Carriers Branch, Office of Regulations and Rulings, 202–927–2320.

SUPPLEMENTAL INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested par-

ties that Customs intends to modify or revoke ruling letters pertaining to the dutiability of "spare parts" as that term is used in 19 U.S.C. 1466(h)(2) and (3). Customs has undertaken reasonable efforts to search existing data bases for rulings on this issue. Although these efforts have yielded a number of rulings too voluminous to specifically identify within this document, we nonetheless have identified 10 rulings as representative samples. This notice will, however, cover any rulings pertaining to the dutiability of "spare parts" as that term is used in 19 U.S.C. 1466(h)(2) and (3) which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should advise the Customs Service during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the reliance of a vessel owner on a ruling issued to a third party, Customs personnel applying a ruling of a third party to a vessel repair entry covering this issue, or the vessel owner's or Customs previous interpretation of 19 U.S.C. 1466(h)(2) and (3). Any person involved in substantially identical transactions should advise Customs during this notice period.

Title 19, United States Code, § 1466(a) (19 U.S.C. § 1466(a), known as the vessel repair statute), provides in pertinent part for the payment of an *ad valorem* duty of 50 percent of the cost of "* * * equipments, or any *part* thereof, including boats, purchased for, or the repair *parts* or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States * * *" (Emphasis added)

On August 20, 1990, the President signed into law the Customs and Trade Act of 1990. (Pub. L. 101–382), section 484E of which amended the vessel repair statute, by adding a new paragraph (h). Subsection (h) included two elements, as follows:

> (h) The duty imposed by subsection (a) of this section shall not apply to—
>
> (1) the cost of any equipment, or any part of equipment, purchased for, or the repair parts or materials to be used, or the expense of repairs made in a foreign country with respect to, LASH (Lighter Aboard Ship) barges documented under the laws of the United States and utilized as cargo containers, or
>
> (2) the cost of *spare* repair *parts* or materials (other than nets or nettings) which the owner or master of the vessel certifies are intended for use aboard a cargo vessel, documented under the laws of the United States and engaged in the foreign or coasting trade, for installation or use on such vessel, as needed, in the United States, at sea, or in a foreign country, but only if duty is paid under appropriate commodity classifications of

> the Harmonized Tariff Schedule of the United States upon first entry into the United States of each such *spare part* purchased in, or imported from, a foreign country. (Emphasis added)

Although section 484E of Pub. L 101–382 expired by its own terms on December 31, 1992, section 1466 was subsequently amended by legislation implementing the provisions of the General Agreement on Tariffs and Trade (GATT) which reinstated subsections (h)(1) and (2), the wording of which remained unchanged from their previous enactment. The amendment, which became effective for all vessel repair entries made on or after January 1, 1995, also added a new subsection (h)(3) which provides as follows:

> (3) the cost of *spare parts* necessarily installed before the first entry into the United States, but only if duty is paid under appropriate commodity classifications of the Harmonized Tariff Schedule of the United States upon first entry into the United States of each such *spare part* purchased in, or imported from, a foreign country. (Emphasis added)

In Headquarters ruling letters (HRLs) 111280, dated December 21, 1990, and 111474, dated March 6, 1991 (published as C.S.D. 91–11), Customs, in response to requests for advice regarding its interpretation of section 484E of Pub. L. 101–382, imparted no significance to the word "spare" appearing therein. In addition, with respect to the reinstated subsections (h)(1) and (2), as well as new subsection (h)(3), Customs has not ascribed any particular meaning to the word *spare* as used in the statute, and thus has applied the provision to all parts which are purchased and installed abroad. Additional representative samples of this interpretation are found in the following HRLs: 113681, dated February 3, 1997; 113991, dated July 2, 1997; 114000, dated July 8, 1997; 114006, dated November 13, 1997; 114119, dated October 8, 1998; 114223, dated May 14, 1998; 114248, dated April 23, 1998; and 114481, dated October 20, 1998.

We now intend to not only modify or revoke HRLs 111280, 111474, 113991, 114119, 114223, 114248, 113681, 114000, 114006, and 114481, but also all other rulings and prior treatment reflecting the same interpretation as in these rulings with respect to the interpretation of the word "spare" as it appears in 19 U.S.C. 1466(h)(2). Our proposed ruling provides that the plain meaning of the word "spare" (i.e., a replacement reserved for future need) is to be given full force and effect in Customs administration of these statutory provisions. Consequently, relief will no longer be granted under these provisions to all parts which are merely purchased and installed abroad. Such parts must also qualify as "spares."

Furthermore, relief pursuant to subsection (h)(2) will only be granted where compliance with the terms of that provision has been met, including the landing of the parts in question in the United States prior to their foreign installation. Such landing further evidences the fact that the subject parts are "spares." In addition, relief pursuant to

19 U.S.C. 1466(h)(3) will only be granted if the requestor submits an invoice for the parts in question that is dated prior to the occurrence necessitating installation and such installation takes place on the voyage prior to the first entry of the vessel in the United States. Relief pursuant to 19 U.S.C. 1466(h)(3) will not be granted where a vessel part is damaged in the United States and the vessel subsequently proceeds foreign where a replacement part is purchased and installed. Such a replacement part is not a "spare" within the meaning of the vessel repair statute. The granting of relief under such circumstances runs contra to the protectionist intent of 19 U. S.C. 1466.

Before modifying and revoking the above-cited HRLs, other similar rulings, and Customs prior treatment pertaining to the dutiability of "spare parts" as that term is used in 19 U.S.C. 1466(h)(2) and (3), consideration will be given to any written comments timely received. Proposed Ruling 114571 is set forth in Attachment to this document.

Dated: March 31, 1999.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

VES–13–18–RR:IT:EC 114571 GEV
Category: Carriers

CHIEF, LIQUIDATION BRANCH
U.S. CUSTOMS SERVICE
Post Office Box 2450
San Francisco, CA 94126

Re: Vessel Repair; Protest; APL SINGAPORE; V–22; Entry No. C27–0167477–5; Protest No. 2704–98–102706; Parts; 19 U.S.C. § 1466(h)(3).

DEAR SIR:

This is in response to your memorandum dated December 30, 1998, which forwarded for our review a protest concerning duties assessed pursuant to the above-referenced vessel repair entry. Our findings are set forth below.

Facts:

The APL SINGAPORE is a U.S.-flag vessel owned by Wilmington Trust Company, trustee for American President Lines, Ltd. The vessel incurred foreign expenditures in May of 1998. The vessel subsequently arrived in the United States at San Pedro, California, on May 23, 1998. A vessel repair entry was timely filed. This entry was previously reviewed by your office and liquidated on October 16, 1998. A protest, dated December 21, 1998, was timely filed.

At issue are Item nos. 4 (antenna mast stays), 6 (catchment sumps), 7 (marine VHF antenna), and 8 (pneumatic system parts). With respect to Item no. 7, the record reflects that

the antenna that was replaced was damaged in San Pedro, California, on April 11, 1998. However, the subject vessel subsequently proceeded to Singapore where the replacement antenna was purchased and installed. (See Sonco (Pte) Limited invoice no. APL/E/98/18, dated May 6, 1998, with accompanying service purchase order//220088.)

The protestant contends that all four items at issue are classifiable under subheading 9818.00.05, HTSUS (19 U.S.C. § 1466(h)(3)). In support of this contention the protestant has submitted the following: a copy of an e-mail from the vessel (Enclosure A); invoice no. 101681 from Metalock Seaserv (Singapore) Pte Ltd. (Enclosure B); and an Entry Summary Continuation Sheet (Enclosure C). The record also contains the following additional documentation not previously cited: (1) Sonco (Pte) Limited invoice no. APL/E/98/19 with accompanying service purchase order #220084; and (2) Sonco (Pte) Limited invoice no. APL/E/98/20 with accompanying service purchase order #220085.

Issue:

Whether the articles covered by Item nos. 4, 6, 7 and 8 in the subject entry are classifiable under subheading 9818.00.05, HTSUS (19 U.S.C. § 1466(h)(3)).

Law and Analysis:

Title 19, United States Code, § 1466(a), provides in part for payment of an *ad valorem* duty of 50 percent of the foreign cost of equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country to vessels documented under the laws of the United States to engage in the foreign or coastwise trade, or vessels intended to engage in such trade.

Section 1466 was amended by the reinstatement of subsections (h)(1) and (2), the wording of which remain unchanged from their previous enactment as part of the Customs and Trade Act of 1990 (§ 484E of Pub. L. 101–382), which had expired by its terms on December 31, 1992. The amendment, which is effective for all vessel entries made on or after January 1, 1995, also added a new subsection (h)(3) which provides as follows:

> (3) the cost of *spare parts* necessarily installed before the first entry into the United States, but only if duty is paid under appropriate commodity classifications of the Harmonized Tariff Schedule of the United States upon first entry into the United States of each spare part purchased in, or imported from, a foreign country. (Emphasis added)

The scope of the amendment is narrow. It is useful to bear in mind that the limiting language of (h)(3) refers only to "spare parts", whereas subsection (a) of the statute assesses duty on a broad range of costs including "equipments, or any *part* thereof, including boats, * * * or the repair *parts* or *materials* to be used, or the expenses or repairs * * *" (Emphasis added). It is clear that the Congress has extended a vessel repair duty limitation under subsection (h)(3) only to certain qualifying parts.

A *part* under § 1466 is determined to be something which does not lose its essential character or its identity as a distinct entity but which, like materials, is incorporated into a larger whole. It would be possible to disassemble an apparatus and still be able to readily identify a part. The term *part* does not mean part of a vessel, which practically speaking would encompass all elements necessary for a vessel to operate in its designed trade. Examples of parts as defined are seen in such items as piston rings and pre-formed gaskets, as opposed to gaskets which are cut at the work site from gasket material.

For purposes of § 1466, the term *materials* is determined to mean something which is consumed in the course of its use, and/or loses its identity as a distinct entity when incorporated into the larger whole. Some examples of materials as defined are seen in such items as a container of paint which is applied to vessel surfaces, and sheets of steel which are incorporated into the hull and superstructure of a vessel.

The term *equipment* is determined to mean something which constitutes an operating entity unto itself. Equipment retains at least the potential for portability. Equipment may be affixed to a vessel in a non-permanent fashion, such as by means of bolts or other temporary methods, which is a feature distinguishing it from being considered an integrated portion of the hull and superstructure of a vessel. Examples of equipment as defined are seen in such items as winches and generators.

Subsection (h)(3) is administered by maintaining the requirement that a vessel repair entry (Customs Form 226) must be filed upon first arrival in the United States of vessels covered by the repair statute. Since issuance of instructions by Customs Headquarters on May 31, 1995 (Headquarters Memorandum 113291), in instances in which a vessel operator claims certain foreign parts expenditures to be within the terms of subsection (h)(3), it has been required that continuation sheets normally submitted with entries for consump-

tion (Customs Form 7501–A) be completed and attached to the vessel repair entry form. The continuation sheets must provide all required information necessary to assign the proper duty rate as listed in the Harmonized Tariff. The vessel repair entry number is the sole number assigned to the entry, and such an entry with continuation sheets attached is considered to be a vessel repair entry. For entries which followed the January 1, 1995, effective date of the statutory amendments, but which preceded the issuance of Headquarters guidance, the form of entry was guided by local Customs practice, and most commonly saw a vessel repair entry accompanied by an entry for consumption.

As noted above, in the present matter the protestant claims that the articles covered by Item nos. 4, 6, 7 and 8 of the subject entry are classifiable under the provisions of subsection 1466(h)(3). We have reviewed the record in its entirety and find as follows.

With respect to Item no. 4, notwithstanding the protestant's claim that the antenna mast stays in question were installed by the vessel' s crew (see Enclosure A), we note that the vendor' s invoice covering this cost nonetheless states, "Provide Labor, Equip & Engineering to Replace Antenna Mast Stays * * *" We further note that this invoice is signed and stamped by both the subject vessel's Master and Chief Engineer. The great weight of evidence regarding Item no. 4 is therefore probative of the fact that the unsegregated cost appearing on the invoice covers more than just the parts in question (i.e., labor, equipment and engineering). In view of the fact that the scope of (h)(3) is limited solely to *parts*, the protestant's claim with respect to Item no. 4 is denied.

Item no. 6 covers catchment sumps. These articles constitute equipment rather than parts as discussed above. Consequently, the protestant's claim for this item is denied.

Item no. 7 covers a marine VHF antenna. While this antenna is a "part" within the meaning of the vessel repair statute, the documentation contained within the record (service purchase order #220088) indicates that the antenna that was replaced was damaged in San Pedro, California, on April 11, 1998. The vessel subsequently proceeded to Singapore where the replacement antenna was purchased and installed (see Sonco (Pte) Limited invoice no. APL/E/98/18, dated May 6, 1998). As noted above, the limiting language of (h)(3) refers only to "spare" parts. In regard to Customs interpretation of this provision, we have previously stated that, "We are unable to ascribe any particular meaning to the word *spare* as used in the statute, and so will apply the provision to all parts which are purchased and installed." (Headquarters memorandum 113291; see also Headquarters ruling letters 111280 and 111474) However, upon further review of this matter we are of the opinion that not only is such an interpretation contrary to the protectionist *intent* of the vessel repair statute, it also runs contra to a basic tenet of statutory construction recognized by the federal courts that:

> "* * * words in statutes should not be discarded as 'meaningless' or 'surplusage' when Congress specifically and expressly included them, particularly where the words are excluded in other sections of the same act."

United States v. Wong Kim BO, 472 F.2d 720, 722 (1972); see also *City of Galatin v, Cherokee County*, 563 F.Supp. 940, 946 (1983); *United States v. Handy*, 761 F.2d 1279, 1280 (1985); and *Enserch International Exploration, Inc., v. Attlock Oil Company, Ltd*, 656 F.Supp. 1162, 1165 (1987).

Accordingly, the plain meaning of the word "spare" (i.e., a replacement reserved for future need) is to be given full force and effect in Customs administration of the vessel repair statute. To that end, relief pursuant to 19 U.S.C. 1466(h)(3) will only be granted if the requestor submits an invoice for the parts in question that is dated prior to the occurrence necessitating installation and such installation takes place on the voyage prior to the first entry of the vessel in the United States. Relief pursuant to 19 U.S.C. 1466(h)(3) will not be granted where, as in this case, a vessel part is damaged in the United States and the vessel subsequently proceeds foreign where a replacement part is purchased and installed. Such a replacement part is not considered a "spare" within the meaning of the vessel repair statute.

However, pursuant to 19 U.S.C. 1625(c)(1) and (2), interpretive rulings which modify or revoke a prior interpretive ruling, or modify treatment previously accorded by Customs to substantially identical transactions, shall be published in the Custom Bulletin and subject to a 30-day comment period. After consideration of any comments received, Customs shall publish a final ruling in the CUSTOMS BULLETIN within 30 days after the closing of the comment period which shall become effective for all vessel repair entries filed on or after 60 days after the date of publication.

Accordingly, in view of the fact that our above-discussed position with respect to the word "spare" as it appears in 19 U. S.C. 1466(h)(2) and (3) constitutes a revocation/modification of our current position and is to be applied prospectively in accordance with the provisions of 19 U.S.C. 1625(c)(1) and (2), the protestant's claim for Item no. 7 is granted.

Item no. 8 covers pneumatic system parts. The protestant's claim for this item is granted.

Holding:

The articles covered by Item nos. 4 and 6 in the subject entry are not classifiable under subheading 9818.00.05, HTSUS (19 U.S.C. § 1466(h)(3)). The articles covered by Item nos. 7 and 8 in the subject entry are classifiable under subheading 9818.00.05, HTSUS (19 U.S.C. § 1466(h)(3)).

The protest should be granted in part. In accordance with § 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, you are to mail this decision, together with the Customs Form 19, to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with this decision must be accomplished prior to mailing the decision. Sixty days from the date of the decision, the Office of Regulations and Rulings will make the decision available to Customs personnel, and to the public on the Customs Home Page on the World Wide Web at www.customs.ustreas.gov, by means of the Freedom of Information Act, and other methods of public distribution.

JERRY LADERBERG,
Chief,
Entry Procedures and Carriers Branch.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
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Clerk

Raymond F. Burghardt

PUBLIC VERSION

(Slip Op. 99–20)

COALITION FOR THE PRESERVATION OF AMERICAN BRAKE DRUM AND ROTOR AFTERMARKET MANUFACTURERS, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND CHINA NATIONAL AUTOMOTIVE INDUSTRY IMPORT & EXPORT CO., MIDWEST AIR TECHNOLOGIES, INC., MAT AUTOMOTIVE INC., SHENYANG HONBASE MACHINERY CO., LTD., LAIZHOU LUYUAN AUTOMOBILE FITTING CO., LTD., QUINGDAO METAL, MINERALS & MACHINERY IMPORT & EXPORT CORP., YANTAI IMPORT & EXPORT CORP., LAIZHOU SANLI MACHINERY-MAKING CO., LONGKOU BOHAI MACHINERY CO., YENHERE CORP., LAIZHOU CAPCO MACHINERY CO., LTD., BEIJING XINCHANGYUAN AUTOMOBILE FITTINGS CORP., CHINA NATIONAL MACHINERY IMPORT & EXPORT CO., CHINA NATIONAL MACHINERY IMPORT & EXPORT (XINJIANG) CO., XIANGHE ZICHEN GROUP CO., HEBEI METALS AND MACHINERY IMPORT & EXPORT CORP., SHANXI MACHINERY AND EQUIPMENT IMPORT & EXPORT CORP., CHINA NORTH INDUSTRIES CORP. (GUANGZHOU), CHINA NORTH INDUSTRIES CORP. (DALIAN), JILIN PROVINCIAL MACHINERY AND EQUIPMENT IMPORT & EXPORT CORP., XU ZHOU YUNHE (CANAL) MACHINERY, LONGJING WALKING TRACTOR WORKS FOREIGN TRADE IMPORT & EXPORT CORP., CHANGZHI AUTOMOTIVE PARTS FACTORY, ZIBO BOTAI MANUFACTURING CO., LTD., AND SOUTHWEST TECHNICAL IMPORT & EXPORT CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 97–05–00874

[Plaintiff's Motion for Judgment on the Agency Record is denied.]

(Decided February 19, 1999)

Porter, Wright, Morris, Arthur (Leslie Alan Glick) for Plaintiff.

David Ogden, Assistant Attorney General; *David M. Cohen*, Director, *Lucius Lau*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, and *Linda S. Chang*, Attorney of Counsel, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

White & Case (William J. Clinton and *Adams Lee)* for Defendant-Intervenors.

OPINION

I.

INTRODUCTION

WALLACH, *Judge:* Plaintiff, The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers (the "Coalition"),[1] brings this action pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record. Plaintiff contests certain aspects of the Department of Commerce, International Trade Administration's ("ITA" or "Commerce") final results entitled *Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 9160 (1997) *("Final Determinations")* and the final amended determinations entitled *Notice of Amended Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 15,655 (1997). The period of investigation ("POI") covered each exporter's two most recent fiscal quarters prior to the filing of Plaintiff's petition. *Final Determinations* at 9161.[2] For Respondent Southwest Import & Export Corp. ("Southwest"), the POI is June 1995 through December 1995. *Id.* For all other Respondents, the POI is July 1995 through December 1995.[3] *Id.*

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994).

II.

BACKGROUND

On March 7, 1996, Plaintiff filed an antidumping petition with the ITA and the United States International Trade Commission ("ITC" or "Commission") requesting the initiation of an antidumping investigation on certain brake drums and rotors from the People's Republic of China ("PRC" or "China"). On April 3, 1996, the ITA published its notice of initiation of antidumping investigations of brake drums and rotors from China. *Initiation of Antidumping Duty Investigations: Certain Brake Drums and Certain Brake Rotors from the People's Republic of China*, 61 Fed. Reg. 14,740 (1996).

On October 10, 1996, Commerce published its preliminary determinations of sales at less-than-fair value ("LTFV"). *Notice of Preliminary Determinations of Sales at Less Than Fair Value and Postponement of Final Determinations: Brake Drums and Brake Rotors from the*

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[1] The Coalition is composed of the following companies: Brake Parts, Inc., McHenry IL.; Kinetic Parts Manufacturing, Inc., Harbor City, CA; Iroquois Tool Systems, Inc., North East, PA; and Wagner Brake Corp., St. Louis, MO.

[2] Because the administrative review at issue was initiated after January 1, 1995, the applicable statutory provisions are the amendments made by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994).

[3] Other Respondents include: China National Automotive Industry Import & Export, Co., Midwest Air Technologies, Inc., Mat Automotive Inc., Shenyang Honbase Machinery Co., Ltd., Laizhou Luyuan Automobile Fittings Co., Ltd., Quingdao Metal Minerals & Machinery Import & Export Corp., Yantai Import & Export Corp., Laizhou Sanli Machinery-Making Co., Longkou Bohai Machinery Co., Yenhere Corp., Laizhou CAPCO Machinery Co., Ltd., Beijing Xinchangyuan Automobile Fittings Corp., China National Machinery and Equipment Import & Export Co., Xinghe Zichen Group Co., Hebei Metals & Machinery Import & Export Corp., Shanxi Machinery and Equipment Import & Export Corp., China North Industries Corp. (Guangzhou), China North Industries Corp. (Dalian), Jilin Provincial Machinery and Equipment Import & Export Corp., Xu Zhou Yunhe (Canal) Machinery, Longjing Walking Tractor Works Foreign Trade Import & Export Corp., Changzhi Automotive Parts Factory, and Zibo Botai Manufacturing Co.

People's Republic of China, 61 Fed. Reg. 53,190 (1996) *("Preliminary Determinations")*. On February 28, 1997, Commerce published its final affirmative determinations of sales at LTFV for both brake drums and rotors. *Final Determinations.*

On April 16, 1997, the ITC issued its decision finding that a United States industry was not being materially injured or threatened with material injury by reason of imports of certain brake drums from China. In contrast, the Commission made an affirmative injury determination concerning certain brake rotors. *See Certain Brake Drums and Rotors From China*, 62 Fed. Reg. 18,650 (1997).[4]

On May 16, 1997, Plaintiff filed two summonses in this Court contesting some aspects of Commerce's affirmative LTFV determinations as to brake drums (Court No. 97–05–00874) and brake rotors (Court No. 97–05–00875).[5] Specifically, Plaintiff claimed that Commerce erred in its: 1) decision not to apply "facts available" to all Respondents; 2) solicitation and reliance on publicly available information from the Respondents; 3) rejection of part of Plaintiff's administrative case brief; 4) determination to apply separate rates for selected Respondents; 5) assignment of averaged selected Respondents' rates to non-selected Respondents; 6) critical circumstances determination with regards to non-selected Respondents; 7) rejection of Indian surrogate values from Shivaji Works Limited ("Shivaji"); and 8) use of an Indian surrogate value from Jayaswals Neco Limited ("Jayaswals") for castings for Respondent and selection of surrogate values for various other factors of production.

III.

DISCUSSION

A.

THE STANDARD OF REVIEW FOR ITA DETERMINATIONS REQUIRES AFFIRMATION UNLESS A DETERMINATION IS UNSUPPORTED BY SUBSTANTIAL RECORD EVIDENCE OR OTHERWISE NOT IN ACCORDANCE WITH LAW.

The Court "shall hold unlawful any determination, finding or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1) (1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York Inc. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

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[4] Plaintiff challenged the ITC brake drum determination in this Court in Court No. 97–05–00876. The Court affirmed the ITC finding of no material injury or threat of material injury of certain brake drums in *The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States*, 15 F. Supp.2d 918 (CIT 1998).

[5] On September 16, 1997, the Court granted the consent motion to consolidate the two actions into Court No. 97–05–00874.

B.

COMMERCE'S DETERMINATION TO RELY ON RESPONDENTS' REPORTED INFORMATION INSTEAD OF FACTS OTHERWISE AVAILABLE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Pursuant to 19 U.S.C. § 1677e(a) (1994) Commerce is required to use facts otherwise available[6] if necessary information is not available on the record, or:

> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title.[7]

Section 1677e(a) additionally provides that the use of facts available shall be subject to the limitations set forth in 19 U.S.C. § 1677m(d) (1994). 19 U.S.C. § 1677e(a) (1994). Section 1677m(d) provides that if Commerce:

> determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] * * * shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—
>
> (1) the [Commerce] finds that such response is not satisfactory, or
>
> (2) such response is not submitted within the applicable time limits,
>
> then [Commerce] may, * * * disregard all or part of the original and subsequent responses.

This statute "is designed to prevent the unrestrained use of facts available as to a firm which makes its best effort to cooperate with the Department [of Commerce]. This section was enacted, as part of the URAA, Pub. L. 103–465 § 231, to implement portions of Annex II to the AD Agreement,[8] which provides, in part, that information which 'may

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[6] Formally referred to as "best information available" or "BIA" under 19 U.S.C. § 1677e(c) (1988).

[7] The 1988 statute was amended by the URAA, Pub.L. No. 103–465, § 231 (1994), to conform to the requirements of Article 6.8 and Annex II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("GATT") 1994. Agreement on Implementation of Article VI of the GATT 1994, Annex II, April 15, 1994 [hereinafter "Antidumping Code"], Marrakesh Agreement Establishing the World Trade organization [hereinafter "WTO Agreement"], Annex 1A, *reprinted in The Results Of The Uruguay Round Of Multilateral Trade Negotiations: The Legal Texts* 168 (World Trade Organization 1995) (1994).

[8] Antidumping Code

not be ideal' should not be disregarded if the party 'has acted to the best of its ability.'" *Borden Inc. v. United States*, 4 F. Supp.2d 1221, 1245 (CIT 1998).[9]

If Commerce determines that use of facts available is warranted, Section 1677e(b) permits an adverse inference if Commerce can make an additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b) (1994).

In this case, after the ITA issued questionnaires, the investigated Respondents[10] submitted responses, some of which were later found to contain errors and omissions. Commerce, in accordance with 19 U.S.C. § 1677m(d) (1994), allowed these Respondents to correct and supplement these errors before and during verification. Consequently, Commerce relied on this information, having found that the "revisions were not unduly extensive" and that there was "no basis to conclude that these errors affect the overall integrity of the response." *Final Determinations* at 9167.

Plaintiff initially argues that the ITA improperly allowed these Respondents to submit revisions and corrections to their questionnaire responses. *See* Memorandum of Law in Support of Plaintiff's Rule 56.2 Motion For Judgment Upon The Agency Record ("Plaintiff's Brief") at 4–12. Additionally, Plaintiff alleges that Commerce should have rejected these Respondents' data and applied "facts otherwise available" or the China-wide rate to calculate Respondents' margin. *Id.* Plaintiff contends that these Respondents "significantly impede[d] a proceeding under the antidumping law by providing incorrect data or by failing to provide data." *Id.* at 11 (quoting 19 U.S.C. § 1677e(a)(2)(C)). Specifically, Plaintiff cites to numerous examples of errors raised in the verification reports of selected Respondents.[11] *Id.* at 4–12. Because many of

[9] Annex II of the Antidumping Code "sets forth general guidelines intended to prevent the arbitrary imposition of 'facts available,' particularly where the form rather than the substance of submitted information is at issue." Corr, Christopher, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. Int'l L. & Bus. 49, 78 n.145 (1997).

[10] Commerce did not have sufficient resources to investigate all Respondents who submitted questionnaire responses. *See* Memorandum from Magd A. Zalok to Barbara Stafford of 7/19/96 ("Zalok Memo"), ITA Pub. Doc. 170.

[11] *See* Verification of the Responses of Changzhi Autom. Parts Factory ("Changzhi"), ITA Pub. Doc. 320 at 3, 10 (correcting control numbers, correcting supplier distances); Verification of the Responses of Beijing Xinchangyuan ("XCY"), ITA Pub. Doc. 423 at 8, 12–14 (correcting reporting of brokerage and handling expenses, correcting reversal of weights of steel strip and nails, correcting labor hours worked for July and October, noting lack of sales reported for October could not be substantiated); Verification of the Responses of Shenyang Honbase ("Shenyang"), ITA Pub. Doc. 422 at 8–10 (reconciling stopwatch-time labor hours and reported headcount hours, reclassifying administration, food and water service, security personnel, drivers and heating room labor as general and administrative expenses, correcting mode of transportation for bearing cups and balance weights); Verification of the Responses of Laizhou CAPCO, ITA Pub. Doc. 435 at 1, 15 (correcting consumption of steel scrap to include iron scrap, correcting weights for lugs and bearings cups, finding clerical error in weight of cardboard packing carton resulted in understatement but noting differences were not of significant magnitude); Verification of the Responses of Laizhou Luyuan, ITA Pub. Doc. 418 at 2, 9–10 (correcting revisions submitted by Laizhou including, *inter alia*, final 1995 financial statements, worksheets for hours of unskilled workers, kerosene and balance weights, noting that certain workers may be included to recalculate labor usage; noting that reported inventory figures are based on oral estimates and thus not confirmable); Verification of the Responses of Yangtze Machinery Co. ("Yangtze"), ITA Pub. Doc. 432 at 6–11 (correcting, *inter alia*, consumption amounts for dehydrating oil used in April and May 1995, cleaning agent in May 1995 and pig iron and ferrosilicon, correcting weights for bolts and bearing cups, recalculating kilowatt hours per piece, correcting weight of packing material); Verification of the Responses of Laizhou Magnetic Iron Powder Clutch General Factory ("Laizhou MIP"), ITA Pub. Doc. 433 at 2, 21–23 (correcting minor changes submitted by Respondent, noting Respondent's over-reporting of corrugated cartons, steel strip usage, wood crates, iron nails and adhesive tape); Verification of the Responses of Southwest, ITA Pub. Doc. 425 at 5 (providing only one purchase order from the POI to explain sales process); Verification of the Responses of China National Automotive Import & Export Corp. ("CAIEC"), ITA Pub. Doc. 428 at 1 (acknowledging minor revisions made by Respondent at verification such as 16 cents differential in invoice I95E/16078).

these responses were allegedly "boilerplate and incomplete," *id.* at 4, or "late corrections made days before or even at verification," *id.* at 5, Plaintiff argues they should be rejected in favor of facts otherwise available.

As a threshold matter, Plaintiff's contention that the ITA erroneously allowed Respondents to submit revisions to their questionnaire responses is misplaced. During the course of the investigation, Commerce informed Respondents that "[n]ew information will be accepted at verification only when * * * the information makes minor corrections to the information already on the record, or * * * the information corroborates, supports, or clarifies information already on the record." Letter from Gary Taverman to William J. Clinton of 10/17/96, ITA Pub. Doc. 357 at 2. Commerce's action conforms with the statutory directive of 19 U.S.C. § 1677m(d) (1994) which allows for the submission of new information at verification in order to "remedy or explain" a deficiency.[12] *Cf. Koenig & Bauer-Albert AG v. United States*, 15 F. Supp.2d 834, 845 (CIT 1998) ("Congress has afforded ITA a degree of latitude in implementing its verification procedures.") (citation omitted).

The Court must also reject Plaintiff's argument that the "quantity and substance of inaccurate and incomplete [questionnaire] answers" submitted by Respondents require the application of "facts available." Plaintiff's Brief at 4.

Commerce possesses the "'discretion to determine whether a Respondent has complied with an information request.'" *Helmerich & Payne, Inc. v. United States*, 24 F. Supp.2d 304, 308 (CIT 1998) (quoting *Daido Corp. v. United States*, 19 CIT 853, 861, 893 F. Supp. 43, 49–50 (1995)). Through verification, Commerce tests the information provided by a party for accuracy and completeness so that Commerce can justifiably rely upon that information. *Tatung Co. v. United States*, 18 CIT 1137, 1140 (1994). Commerce usually concludes that errors in a response that are not substantial do not effect the integrity of the response. *See e.g., Ferrosilicon from Brazil: Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 59,407, 59,409 (1996).[13] "[T]he issue is not the value of the errors as a percentage of total U.S. sales, or the number of instances of errors. Rather the issue is the nature of the errors and their effect on the validity of the submission." *Tatung*, 18 CIT at 1141.

In this case, Respondents submitted the necessary information required to make a proper dumping determination, and Commerce veri-

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[12] The Court finds that Commerce reasonably found that the "failure to initially submit an error-free response, or the correction of these errors, should [not] result in the use of facts available." *Final Determinations* at 9167. Commerce's approach conforms to the reasoning of Annex II of the Antidumping Code explained *supra* at Note 8. Antidumping Code, Annex II, Para. 6 ("even though information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability").

[13] For example, Plaintiff describes Respondent Yangtze's incorrectly reported packing material data as a material and substantial error. Plaintiff's Brief at 9. In contrast, Commerce calculated a 0.0002 kg weight differential for some models and noted that the errors were minor. *See* Verification of the Responses of Yangtze, ITA Pub. Doc. 432 at 10–11. Similarly, Plaintiff contends that Respondent Southwest's provision of only one purchase order from the POI to explain its sales process demonstrates an inability or unwillingness to cooperate, justifying the use of facts available. Plaintiff's Brief at 7. However, the verification report indicates that Respondent Southwest supplemented its response with at least eight other documents to explain its sales process. *See* Verification of the Responses of Southwest, ITA Pub. Doc. 425 at 5.

fied the responses as accurate and reliable. Commerce found that Respondents' revisions to their responses were not "unduly extensive" and the errors corrected by Commerce at verification did not "affect the overall integrity of the response." *Final Determinations* at 9167.[14] Moreover, as Defendant-Intervenor aptly notes, "in every instance in which the Department encountered errors, the Department was able to verify the correct information." Defendant-Intervenors' Response Memorandum of Law at 18; *see also Final Determinations* at 9167 (all such deficiencies can be corrected using verified data on the record).[15] Therefore, "[i]n the end, the errors were corrected and the data were verified." *Magnesium Corp. of America v. United States*, 938 F. Supp. 885, 903 (CIT 1996). Plaintiff does not allege that Commerce incorrectly calculated the margins or implemented an arbitrary verification methodology. Plaintiff "rather, proposed a blind, punitive use of [facts otherwise available], which is clearly disfavored." *Id.*

Finally, to the extent that Plaintiff argues for the application of adverse facts available, the Court finds that "'Commerce could not resort to adverse [facts otherwise available] because [Respondents] complied with all information requests.'" *Peer Bearing Co. v. United States*, Ct. No. 97–01–00023, 1998 WL 283544, *4 (CIT May 27, 1998) (citing *Shieldalloy v. United States*, 975 F. Supp. 361, 363 (CIT 1995).

Therefore, upon review of the administrative record, the Court concludes that Commerce's determination to rely on the Respondents' reported information and not resort to facts otherwise available is supported by substantial evidence and is otherwise in accordance with law.

C.

The ITA's Decision To Request Publically Available Information From The Parties Is Supported By Substantial Evidence And In Accordance With Law

Well-settled principles of administrative law afford an agency broad discretion to fashion its own rules of administrative procedure, including the authority to establish and enforce time limits concerning the

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[14] Plaintiff claims that *Light Walled Welded Rectangular Carbon Steel Tubing from Argentina*, 54 Fed. Reg. 13,913, 13,915 (1989) stands for the proposition that Commerce rejects late corrections made days before or even at verification in favor of BIA. Plaintiff's Brief at 5. It is, however, distinguishable since Commerce, in that determination, while noting that allowances are made for minor revisions to questionnaire responses during verification, relied on BIA. Commerce used BIA because the new information submitted by Respondents during verification prevented Commerce analysts from verifying other products which they would have normally verified. In this case, Commerce was able to verify all the information. *Final Determinations* at 9164.

Empresa Nacional Siderurgica S.A. v. United States, 880 F. Supp. 876, 880 (CIT 1995), cited by Plaintiff, is also distinguishable. In that case, Commerce applied BIA because the respondents never submitted questionnaire responses to an entire section relating to cost of production/constructed value data, despite an additional eight day extension. Here, Respondents fully cooperated with the ITA.

[15] In this regard, Plaintiff's reliance on *Union Camp Corp. v. United States*, 941 F. Supp. 108, 115 (CIT 1996) is unjustified. *See* Plaintiff's Brief at 9. Plaintiff cites to *Union Camp* to argue that, as in the case at bar, where Respondents fail to specify "the amount, weight, and type of packing materials used," Commerce justifiably may rely on BIA. *Id.* In this case, Respondents did not fail to respond, but Respondent XCY reversed the weight of the nails and steel strip, and the discrepancy was corrected by Commerce. Verification of the Responses of XCY, ITA Pub. Doc. 423 at 12. Commerce noted no other discrepancies. *Id.* In addition, while the Court notes that Commerce did find "minor discrepancies" in the reporting of Respondent Yangtze's packing material, most of the errors involved Yangtze over reporting the required weights. Verification of the Responses of Yangtze, ITA Pub. Doc. 432 at 10–11; *see also* Verification of the Responses of Laizhou MIP, ITA Pub. Doc. 433 at 21–22.

submission of written information and data. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544–45 (1978). In accord with those principles, Commerce has promulgated regulations which set forth the time limits governing the submission of factual information.

For time limits generally, 19 C.F.R. § 353.31(a) (1997) requires that "submissions of factual information for the Secretary's consideration shall be submitted not "later than * * * seven days before the scheduled date on which the verification is to commence." In addition, 19 C.F.R. § 353.31(a)(2) (1997) allows any interested party to "submit factual information to rebut, clarify, or correct factual information submitted by an interested party * * * at any time prior to the deadline provided in this section for submissions of such factual information or, if later, 10 days after the date such factual information is served on the interested party. * * *"

The regulations further provide time limits for instances where the Secretary requests or solicits factual information. 19 C.F.R. § 353.31(b) (1997) states, in part:

> (1) Notwithstanding paragraph (a) of this section, the Secretary may request any person to submit factual information at any time during a proceeding.
>
> (2) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the time limit for response.

On December 19, 1996, Commerce solicited additional publicly available information ("PAI") regarding surrogate values for its "factors of production" analysis from the parties and notified them that the deadline for "published information to be considered in the final determinations is January 10, 1997." Letter from Gary Taverman to Leslie Glick of 12/19/96, ITA Pub. Doc. 412. Two groups of Respondents submitted PAI relating to surrogate country data within the established deadline. *See* Letter from Katten Muchin & Zavis to Secretary of Commerce of 1/9/97, ITA Pub. Doc. 434; *see also* Letter from White & Case to Secretary of Commerce of 1/10/97, ITA Pub. Doc. 443. Plaintiff did not submit any information within that period.

Plaintiff, however, contends that Commerce improperly allowed Respondents to submit new PAI three months after the preliminary determination of October 10, 1996 and 49 days before the final determination. Plaintiff's Brief at 12. Instead of relying on the new PAI, Plaintiff argues that the ITA should have used the related data submitted by Plaintiff in its submission of August 20, 1996. *Id.* at 12–13. In the alternative, Plaintiff argues that even if the ITA properly accepted Respondents' PAI, the ITA erred by denying Plaintiff the ability to respond with rebuttal PAI pursuant to 19 C.F.R. § 353.31(a)(2)(1997) (allowing 10 days to respond to new factual information). *Id.* at 13. Finally, Plaintiff argues that denial of Plaintiff's ability to respond to the PAI

amounted to a violation of its procedural due process rights. Plaintiff's Reply Memorandum of Law ("Plaintiff's Reply Brief") at 6.

Since the regulations plainly permit Commerce to request factual information **at any time**, Commerce's request for PAI after issuance of the preliminary determination was not contrary to law. 19 C.F.R. § 353.31(b) (1997); *see Floral Trade Council of Davis, CA v. United States*, 15 CIT 497, 502, 775 F. Supp. 1492, 1499 (1991) ("Clearly, the regulations give ITA flexibility to obtain information necessary to its decision * * *."); *Torrington Co. v. United States*, 965 F. Supp. 40, 44 (CIT 1997). In an antidumping investigation, "[t]he statute clearly permits Commerce to obtain information on its own initiative rather than just relying on information submitted to it." *Wieland-Werke AG v. United States*, 4 F. Supp.2d 1207, 1212 (CIT 1998). Indeed, Plaintiff cites no authority to support its contentions and conceded at oral argument that Commerce possessed authority to request the information.

Plaintiff also argues that 19 C.F.R. § 353.31(a)(2) (1997) requires that Plaintiff have ten additional days from the January 10, 1997 deadline established by Commerce to submit factual information rebutting Respondents' PAI. Plaintiff's Brief at 13. Defendant argues that Plaintiff is simply attempting to set its own time limits for the submission of factual information. Defendant's Memorandum in Opposition to the Rule 56.2 Motion for Judgment Upon the Agency Record Filed by the Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers ("Defendant's Response") at 14. Whether or not the additional ten day time to respond should apply to 19 C.F.R. §353.31(b)(2) (1997) is however, an issue which needs not be decided, as the administrative record is devoid of evidence indicating that Plaintiff requested or even attempted to submit rebuttal PAI.[16] Since Plaintiff did not attempt to submit its "rebuttal" PAI, the Court is unable to examine whether or not this data would have fallen within the purview of 353.31(a)(2) by rebutting, clarifying, or correcting Respondents' PAI. *Cf., Zenith Electronics Corp. v. United States*, 18 CIT 320 (1994).

Plaintiff raises its due process argument for the first time in its Reply Brief in violation of USCIT R. 81(l) which provides that "[a] reply brief shall be confined to rebutting matters contained in the brief of the respondent[s]." Nevertheless, "the Court may exercise its discretion to prevent knowingly affirming a determination with errors." *Torrington Co. v. United States*, Ct. No. 95–03–00345, 1997 WL 589412, at *3 (CIT Sept. 19, 1997). If Plaintiff had raised a clear error in its argument, the

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[16] Plaintiff contends, in an argument made dehors the record, that in a telephone conversation with Brian Smith of Commerce sometime in January 1997, Plaintiff's request for permission to submit rebuttal PAI was denied. Plaintiff's Brief at 12 & n.3. This information is inadmissible as it falls outside the scope of the administrative record. *See* 19 U.S.C. § 1516a(b)(2)(A) (1994) (defining contents of administrative record). Plaintiff's counsel conceded in oral argument that he could have memorialized the conversation and placed it in the record by writing a letter to Commerce.

Court could consider the argument. Plaintiff's argument, however, is clearly erroneous and the Court declines to permit its assertion.[17]

D.

THE ITA DID NOT ERR BY REJECTING PART OF PLAINTIFF'S PRE-HEARING BRIEF.

As discussed above, the relevant regulation cautions parties that Commerce will not consider untimely, unsolicited factual information. *See* 19 C.F.R. § 353.31(a)(1)(i) (time limit for submitting factual information is no later than seven days before the scheduled date on which the verification is to commence).[18] "Commerce's policy of setting time limits on the submission of factual information is reasonable because Commerce 'clearly cannot complete its work unless it is able at some point to "freeze" the record and make calculations and findings based on that fixed and certain body of information.'" *Gulf States Tube Division of Quantex Corp. v. United States*, 981 F. Supp. 630, 653 (CIT 1997) (citation omitted).

In this case, Commerce rejected certain parts of Plaintiff's Pre-Hearing Brief on Behalf of Petitioner, The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers ("Plaintiff's Pre-Hearing Brief") as containing new and unsolicited, factual information submitted after the regulatory time limit. Letter from Commerce to Leslie Glick of 1/23/97, ITA Pub. Doc. 476. The information was attached as Exhibits 8 and 9 and incorporated on pages 30 and 31 of Plaintiff's Pre-Hearing Brief. Pre-Hearing Brief, ITA Pub. Doc. 460. The relevant portion of Exhibit 8 states that after the announcement of a 42–65% duty rate for PRC exports, "many factories increased prices in the 2 to 10% range." *Id.* at Exh. 8. Based on this data, Plaintiff concluded that the lack of correlation between the large duty rate imposed and the small increase in price would "indicate a massive diversion of shipments between companies in China to shift exports to the lower rate companies." *Id.*

Exhibit 9 contained an analysis of the public versions of the verification reports to determine if "the information reported was consistent with known and accepted practices in the industry for production, accounting, sales, etc." *Id.* at 31. Based on this data, Plaintiff concluded that Respondents' answers lacked credibility. Both exhibits were authored by Barry Breslow, an individual described by Plaintiff as an "industry expert" who has "had years of experience." *Id.*

Plaintiff argues that the data rejected by Commerce is not new and untimely factual information, but rather "analysis of old factual information that Plaintiff submitted earlier in the investigation." Plaintiff's

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[17] *Compare PPG Industries, Inc. v. United States*, 13 CIT 183, 708 F. Supp. 1327 (1989) (relied on by Plaintiff), *and NTN Bearing Corp. v. United States*, 15 CIT 75, 83, 757 F. Supp. 1425, 1433 (1991), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992) (Plaintiffs' active participation in the hearing and submission of briefs on the issue * * * as well as their repeated correspondence with the ITA on this issue, belie their claim that they were denied due process rights. * * *"); *see also Timken Co. v. United States*, 12 CIT 955, 966, 699 F. Supp. 300, 309 (1988), *aff'd* 894 F.2d 385 (Fed. Cir. 1990).

[18] "The Secretary will not consider in the final determination * * * or retain in the record of the proceeding, any factual information submitted after the applicable time limit. The Secretary will return such information to the submitter with written notice stating the reasons for return of the information." 19 C.F.R. § 353.31(a)(3) (1997).

Brief at 15. Specifically, Plaintiff contends that Exhibit 8 contains "an analysis of the imports of the subject merchandise" and Exhibit 9 contains "an analysis of the ITA's verification reports for Respondents Laizhou CAPCO, CAIEC, Qingdao, Norenco, XCY, Shenyang Honbase, Laizhou Luyan, Midwest Air Technologies, Changzhi Automotive Parts Factory, Yangtze, MMB International, and Southwest." *Id.* at 15–16.

In the alternative, Plaintiff claims that even if its submissions could be construed as factual instead of analytical information, the regulations allow for the submission of "additional factual information, ten days after the submission of data submitted by another party if it is to 'rebut, clarify, or correct factual information submitted by an interested party. * * *'" *Id.* at 16 (citing 19 C.F.R. 353.31(a)(2)). Thus, Plaintiff contends that its submission should have been accepted "because it was submitted within ten business days of receiving the [PAI] information submitted by Defendant-Intervenors." *Id.*

Finally, according to Plaintiff, since the rejected information was submitted during the "course of the proceeding" pursuant to 19 U.S.C. § 1516a(b)(2), it should not have been removed from the administrative record. *Id.* Section 1516a(b)(2)(A) states, in pertinent part, that "the record * * * shall consist of—(I) a copy of all information presented to or obtained by [Commerce] during the course of the administrative proceeding * * *."

The Court finds that Commerce's decision to reject part of Plaintiff's Pre-Hearing Brief is supported by substantial evidence and in accordance with law. Plaintiff's proposed exhibits reveal new and untimely factual information, and, therefore, Plaintiff's reliance on them is impermissible.

Factual information is defined as "(1) Initial and supplemental questionnaire responses; (2) Data or statements of fact in support of allegations; (3) Other data or statements of facts; and (4) Documentary evidence." 19 C.F.R. § 353.2(g) (1997). While it is true that information constituting a reinterpretation of evidence that was before Commerce is permissible, *AK Steel Corp. v. United States*, 988 F. Supp. 594, 602 (CIT 1997); *see also Verson v. United States*, 5 F. Supp.2d 963, 968 n.11 (CIT 1998) ("At the court's discretion, calculations are admissible into evidence if the underlying data upon which they are based is admissible."), in this case, Plaintiff's rejected submission contains new factual data as opposed to calculations or analysis gleaned from the record.

This data falls squarely into the regulatory definition of factual information as "data or statements of fact in support of allegations." 19 C.F.R. § 353.2(g) (1997). Plaintiff has failed to carry its burden of proving that the rejected information was only an analysis of information already contained in the record. *See Nation Ford Chem. Co. v. United States*, 985 F. Supp. 133, 136 (CIT 1997) ("The burden of creating an adequate record lies with the party challenging Commerce's determination * * *."). Plaintiff's only explanation is its cursory conclusion that the analysis was based on "old factual information that Plaintiff sub-

mitted earlier in the investigation—the verification reports." Plaintiff's Reply Brief at 7. Plaintiff fails to indicate where in the reports the information can be found. *Id.*

Moreover, as noted by Defendant, Plaintiff's argument fails because Breslow's analysis of old factual information was expressly offered as an expert opinion. Breslow's theories of mass diversion of shipments and his analysis of whether Respondents reported information was consistent with accepted industry standards clearly assumes the weight of evidence.[19] Although Plaintiff contends in its Reply Brief that Mr. Breslow is "not an outside expert but an employee of a member of the Coalition that was providing an analysis of existing factual information," Plaintiff's Reply Brief at 7, that argument is jejune. It ignores Plaintiff's designation of Breslow as an "industry expert" in its Pre-Hearing Brief, ITA Pub. Doc. 460 at 31 ("XII. ANALYSIS OF ERRORS AND INCONSISTENCIES BY INDUSTRY EXPERT"), and Plaintiff's "distinction" between in-house and outside experts goes only to the weight to be accorded Breslow's testimony, not his status.

Because the administrative record reflects that Plaintiff's unsolicited factual information was submitted outside the time limit provided in 19 C.F.R. § 353.31(a)(1)(i) (1997), Commerce's decision was in accordance with law. *See Emerson Power Transmission Corp. v. United States*, 19 CIT 1154, 1160, 903 F. Supp. 48, 54 (CIT 1995) ("In general, this court has upheld Commerce's rejection of untimely factual information pursuant to 19 C.F.R. § 353.31(a).").

Even if the data rejected by Commerce in Exhibit 8 had been accepted, the record demonstrates that Commerce actually addressed Plaintiff's argument. In response to Petitioner's concern over the mass diversion of shipments between exporters, Commerce stated that it,

> has established that the companies receiving separate rates in these investigations operate independently of each other and of government entities with respect to their exports of the subject merchandise. Thus, these respondents have been assigned rates based on their different cost and pricing structures. It would be a *normal* phenomenon that respondents with lower dumping margins would experience an increase in sales of the subject merchandise as a result of an increase in customers' demand for products with lower duty margins.

Final Determinations at 9167 (emphasis added).

Thus, Commerce actually considered and reasonably rejected Plaintiff's arguments. Consequently, Plaintiff's interests were not prejudiced if Commerce erred by rejecting the relevant information. *Intercargo Insurance Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings.").

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[19] "[A]n expert witness' testimony explaining the terms of a trade is evidence, even though its purpose is to help the fact finder understand the direct evidence presented." *Lillie v United States*, 953 F.2d 1188, 1190 n.4 (10th Cir. 1992).

Plaintiff's alternative argument, that its submission construed as "factual information" falls within the permissible time limits, is misplaced. Plaintiff contends that the rejected information falls within the exception allowing for submissions of factual information beyond a deadline only to "rebut, clarify, or correct factual information submitted by an interested party." 19 C.F.R. § 353.31(a)(2) (1997). Thus, according to Plaintiff, the rejected information must serve to "rebut, clarify, or correct" the PAI submitted by Respondents regarding the surrogate country data on January 10, 1997.

The Court finds, however, that Plaintiff's rejected factual information is wholly unrelated to Respondents' PAI. While Plaintiff's data discusses increasing margins in relation to prices in the marketplace and accepted industry standards for reporting information, the Respondents' PAI is responsive to Commerce's request for more publicly available surrogate information and includes, *inter alia*, detailed financial reports from six Indian foundries for overhead, interest, depreciation and profit. *See* Letter from White & Case to Secretary of Commerce of 1/10/97, ITA Pub. Doc. 443 (responding to Commerce's request for additional PAI). Plaintiff's submission simply does not rebut, clarify or correct Respondents' PAI. Accordingly, the rejected portions of Plaintiff's Pre-Hearing Brief, even under this theory, remains untimely. *Cf. Bowe-Passat v United States*, 17 CIT 335, 338 (1993) ("[T]he burden on the party attempting to submit untimely information remains high indeed.").

Finally, Plaintiff's reasoning that its submitted information was timely under 19 U.S.C.§1516a(b)(2) (1994) is invalid. Plaintiff's contention that Breslow's "analysis" must be accepted as part of the record by Commerce simply by virtue of its having been submitted "during the course of the administrative proceeding" ignores the plain language of the regulations and the broad discretion of Commerce.[20] Plaintiff's theory, as noted by Defendant, *see* Defendant's Response at 15, would render inoperable Commerce's regulations establishing time limits for filing submissions.

Thus, the Court finds that Commerce's rejection of part of Plaintiff's Pre-Hearing Brief comports with the substantial evidence test and was made in accordance with law.

E.

THE ITC'S SEPARATE RATES DETERMINATION FOR SELECTED RESPONDENTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IN ACCORDANCE WITH LAW

Under the broad authority delegated to it from Congress, Commerce has employed "a presumption of state control for exporters in a nonmarket economy." *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). Under this presumption, all exporters receive one non-

[20] Moreover, if Plaintiff's theory was well-grounded, Plaintiff's prior argument that Respondents's PAI should have been rejected as untimely would fail. *See* Plaintiff's Brief at 12 ("There was no justification for permitting Respondents to submit new factual information so late in the investigation * * *.")

market economy country ("NME")[21] rate, or country-wide rate, unless an exporter can "'affirmatively demonstrate' its entitlement to a separate, company-specific margin by showing 'an absence of central government control, both in law and in fact, with respect to exports.'" *Id.* (citations omitted); *see also Transcom, Inc. v. United States*, 5 F. Supp.2d 984, 989 (1998).

To determine whether *de jure* government control exists, Commerce examines evidence of:

> (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses;
> (2) any legislative enactments decentralizing control of companies; or
> (3) any other formal measures by the government decentralizing control of companies.

Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 Fed. Reg. 20588, 20589 (May 6, 1991) (establishing Commerce's practice); see *also Air Products and Chemicals, Inc., v. United States*, 14 F. Supp.2d 737, 742 (CIT 1998) (citations omitted).

Evidence supporting *de facto* absence of government control includes:

> (1) whether each exporter sets its own export prices independently of the government and other exporters;
> (2) whether each exporter can keep the proceeds from its sales;
> (3) whether the Respondent has authority to negotiate and sign contracts and other agreements; and
> (4) whether the Respondent has autonomy from the government in making decisions regarding the selection of management.

Id.; *Final Determination At Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22,585, 22,587 (1994).

In the *Final Determinations* at issue here, Commerce assigned separates rates to all but two of the participating Respondents that requested them.[22] *Final Determinations*, at 9161–62. First, Commerce found that all of the Respondents had provided sufficient documents and copies of relevant PRC laws to establish an absence of *de jure* control. *Id.* at 9161. Commerce explained that "[i]n prior cases, the Department has analyzed the laws which the respondents have submitted in this record and found that they establish an absence of *de jure* control." *Id.* (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Partial-Extension Steel Drawer Slides with Rollers From the People's Republic of China*, 60 Fed. Reg. 54,472 (1995)). Due to inconsistent implementation of the government enactments among different ju-

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[21] A non-market economy country is statutorily defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (1994).

[22] The participating Respondents who requested separate rates are: CAIEC/Laizhou CAPCO, CMC, Qingdao, Shenyang/Laizhou, Southwest, XCY, Xinjiang, Yantai, China North Industries Guangzhou Corp. ("CNIGC") and China North Industries Dalian Corp. ("Dalian"). *Final Determinations*, 62 Fed. Reg. at 9161–62.

risdictions in the PRC, however, Commerce accorded greater weight to its analysis of *de facto* control. *Id.*

Upon review of the evidence presented to it regarding *de facto* control, Commerce determined that CAIEC/Laizhou CAPCO, CMC, Qingdao, Shenyang/Laizhou, Southwest, XCY, Xinjiang, and Yantai demonstrated that:

> (1) [t]hey establish their own export prices;
> (2) they negotiate contracts, without guidance from any governmental entities or organizations;
> (3) they make their own personnel decisions; and
> (4) they retain the proceeds of their export sales, use profits according to their business needs and have the authority to sell their assets and to obtain loans.

Id. Commerce additionally found, in the questionnaire responses, evidence that the relevant Respondents engaged in company-specific pricing during the POI, indicating a lack of coordination among exporters. *Id.* at 9161–62.

As for CNIGC and Dalian, Commerce determined that they failed to rebut the presumption that they operate under *de facto* government control. The record evidence obtained by Commerce demonstrated that CNIGC and Dalian still maintained ties to NORINCO. *Id.* at 9166 ("[T]here is evidence on the record that NORINCO is controlled by the government."). Accordingly, Commerce denied these two Respondents separate rates. *Id.*

Plaintiff contests Commerce's assignment of separate rates. Plaintiff's Brief at 17. Plaintiff argues that the relevant Respondents failed to rebut the presumption of state control both in law and in fact. Plaintiff contends that an analysis of the laws of the PRC alone is insufficient to demonstrate the absence of *de jure* government control. *Id.* at 18. Instead, Plaintiff points to some alleged restrictive state stipulations on individual companies' export licenses to show government control. Plaintiff's Brief at 19. For example, Plaintiff contends that some Respondents submitted evidence showing that they were "required to submit their annual inspection reports, balance sheet, or profit/loss statement on a regular basis to the National Industrial and Commercial Administration in order for the license to be renewed." *Id.* Also, Plaintiff argues that the questionnaire response for Respondent Shenyang shows a legal requirement to report the names of its board members to the Industry and Commercial Administration Bureau. *Id.* This, Plaintiff contends, demonstrates government control over management decisions. *Id.* Another Respondent, Southwest reported that a state authority will conduct annual inspections of the companies. *Id.* Therefore, Plaintiff argues "[i]t is clear that these inspections are a form of control of the government authority over the company operations." *Id.* Finally, Plaintiff asserts that "[d]uring verification, the ITA should have investigated further to find out specific details about these inspections." *Id.*

With regard to an absence of *de facto* control, Plaintiff argues that Respondents failed to meet its burden. Specifically, Plaintiff indicates that several Respondents failed to provide minutes of employee meetings or employee evaluation forms, and Respondent Southwest only provided one pre-petition document. *Id.* at 21–22. Moreover, Plaintiff alleges that Respondents failed to disclose any relationship with the Ministry of Machinery Industry and the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC"). *Id.* This failure to disclose should have resulted in the denial of separate rates to those Respondents requesting separate rates. *Id.* at 23. Finally, Plaintiff contends that "the diversion of shipments of the subject merchandise between exporters observed after the ITA's preliminary determination in this investigation is strong indicia that the companies do not operate independently of each other * * *." *Id.*

The Court finds that Commerce properly assigned separate dumping margins for the relevant Respondents. As a threshold matter, to the extent that Plaintiff insinuates that separate rates should not have been assigned because most of the Respondents were "owned by the people," its argument is unfounded. *See* Plaintiff's Brief at 18 (emphasizing that all Respondents affirmed ownership by the people). This Court has consistently upheld Commerce's methodology for determining government control, *de jure* and *de facto*, including a presumption of state control, as a proper administration of the antidumping statute. *Writing Instrument Manufacturers Association, Pencil Section v. United States*, 984 F. Supp. 629, 642 n.3 (CIT 1997) (citations omitted). Therefore, Commerce's conclusion that "ownership of a company by 'all the people' does not require the application of a single rate," is in accordance with the law. *Final Determinations*, 62 Fed Reg. at 9161.

Additionally, the evidence on the record supports Commerce's determination that the Respondents sufficiently proved an absence of *de jure* state control. While it is true that business licenses containing restrictions may at times indicate control by the government, the issues raised by Plaintiff fail to raise any licensing restrictions which would indicate government control over exports. The fact that some Respondents are required to submit annual inspection reports and balance sheets to demonstrate that they are not engaging in activities outside the scope of their licensed businesses does not establish *de jure* control by the government over export activities. Instead, the Respondents are simply stating their compliance with the reporting laws of the PRC which require proof of operating within the scope of business in order to renew licenses. *See Air Products and Chemicals*, 14 F. Supp.2d at 743 (affirming Commerce's finding of no *de jure* government control even though the company's business license restricts the scope of its business in the PRC). If information reporting requirements necessarily negated free market status, few nations, including our own, could claim to be anything other than non-market economies. *See e.g.*, Securities Act of 1933,

§ 5, 15 U.S.C. § 77(e)(a) (1994) (prohibiting sale of securities unless a registration statement has been filed).

Moreover, in contrast to Plaintiff's assertions, an examination of Respondents' questionnaire responses actually reveals their independence from government control. In response to Commerce's questionnaire regarding its business licenses, Respondents Southwest, MMB Int'l., Inc., Yangtze Machinery Co., and Jiuyang Enterprise Corp. stated that "the license establishes that [a] company is an independent legal entity that is responsible for its own profits and losses." Letter from Williams, Mullen, Christian & Dobbins to Secretary of Commerce of 6/7/96, ITA Pub. Doc. 86 at 4. In addition, CAIEC noted that, other than the legal limitation to engage in the scope of its business activities, "[t]here are no other limitations imposed on Laizhou CAPCO or CAIEC, nor [sic] any entitlements granted to either company by this license." Letter from White & Case to Secretary of Commerce of 6/11/96, ITA Pub. Doc. 97 at 5. Because Commerce did not find any licensing restrictions, Commerce did not err by failing to investigate further the details of the inspections.

Commerce's finding of an absence of *de facto* control is also supported by substantial evidence. During verification, Commerce found nothing to contradict the claims of the Respondents. In contrast to Plaintiff's allegations that the record lacked the breadth of information required to show lack of governmental control, Commerce fully examined and verified sales documents, bank statements, company correspondence, loan documents, long-term investments and the articles of incorporation of those Respondents that it found qualified for separate rates. ITA Pub. Doc. 416–435, Administrative Record ("A.R.") Fiche Nos. 253–304 (verification exhibits). For Southwest, for example, Commerce evaluated the organization and corporate structure, and also examined "**how Southwest negotiates sales and how prices are set,**" and "sales terms, prices and other contract provisions for Southwest's pre-selected sales." Verification of Sales Response of Southwest, ITA Pub. Doc. 425 at 1–2 (emphasis in original). In order to ascertain that Southwest does not coordinate selling and pricing activities with other exporters and the China Chamber of Commerce, the ITA examined sales documentation, contracts, purchase orders and Southwest's sales accounting system. *Id.* at 3. Additionally, Commerce verifiers examined the process by which Southwest deals with convertible currency from export sales, including whether there are any restrictions on the use of foreign currency. *Id.*

Despite Plaintiff's contention that Southwest provided only one pre-petition[23] document evidencing lack of *de facto* governmental control, Plaintiff's Brief at 21–22, a review of the record reveals that Southwest provided ample pre-petition documentation. In addition to the "Circular of Independent Financial Relation Between Headquarters and the

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[23] Plaintiff filed its petition on March 7, 1996. Petition from Porter Wright Morris & Arthur to Secretary of Commerce of 3/7/96, ITA Pub. Doc. 1.

Branches" with an attached "Debit Transfer Accounts Notice" issued January 17, 1987, Commerce examined a December 30, 1992 announcement for the change in names from China National Technical Import & Export Corp., Xinan Company to Southwest Technical Import & Export Corp., 1995 financial statements, a "1995 Proposed Plan from the General Manager," a "1995 Conference Resolution" and a document entitled "Operating Indexes and Check-Up System for 1995." *Id.* at 2–4. Also, in order to explain its sales process, Southwest provided a substantial amount of 1995 correspondence. *Id.* at 5.[24]

Plaintiff also argues that the failure by MOFTEC and all Respondents to provide documentary evidence of their relationship demonstrates a failure to prove an absence of governmental control and should have resulted in use of facts available. Plaintiff's Brief at 22. The record indicates that Commerce met with the Ministry of Machinery Industry in order "to discuss the relationship between the Ministry of Machinery Industry and China North Industries Corp. (National NORINCO) and the Ministry's relationship with CNIGC and Dalian. Memorandum from Brian Smith to Gary Taverman of 1/16/97, ITA Pub. Doc. 458. While Commerce noted that Ministry officials did not provide some requested documentation, Commerce, in the end, denied separate rates for CNIGC and Dalian. *Final Determinations* at 9162. As for the other Respondents, Plaintiff points to no evidence to demonstrate that Respondents "withheld relevant and material information."[25] Accordingly, Commerce's finding that there was "no evidence that these respondents are controlled by MOFTEC or the Ministry of Machinery Industry, or any level of the PRC government," *Final Determinations* at 9167, is reasonably supported by the record.

As for Plaintiff's concern regarding the diversion of shipments, Commerce properly rejected Plaintiff's "expert testimony" as the untimely submission of factual information. However, as noted earlier, Commerce reasonably found that no concern for massive diversion of shipments between exporters existed since "the Department has established that the companies receiving separate rates in these inves-

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[24] The Court notes that Plaintiff's reliance on *Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT 931, 806 F. Supp. 1008 (1992) is inapposite. The Court in *Tianjin*, found that the record lacked evidence of any business licenses, sales correspondence, bank records and corporate credentials. *Tianjin*, 16 CIT at 936, 806 F. Supp. at 1014. In this case, Commerce found evidence of all such documentation.

[25] The evidence proffered by Plaintiff to demonstrate that all Respondents withheld information is inadequate. Plaintiff asserts that when asked under the questionnaire section entitled "Separate Rates" to describe "[y]our company's relationship with the national, provincial, and local governments, including ministries or offices of those governments," the Respondents receiving separate rates answered that they have ["no relationship with any level of the PRC government."] *See e.g.*, A.R. Fiche No. 102, at 000008–000009 (Section A Questionnaire Response of Respondent CMC); *see also*, A.R. Fiche Nos. 103–105 (Section A Questionnaire Responses of Respondents, Yantai and Qingdao). Plaintiff argues that Respondents withheld information about their relationship with the government because Ministry of Machinery Industry officials told the ITA that the Ministry meets with representatives of manufacturers three to four times a year and MOFTEC handles dealings with trading companies. Plaintiff's Brief at 22. Commerce, however, found no evidence of control by the PRC government and Plaintiff only points to a memo in the record documenting Commerce's visitation with the Ministry of Machinery Industry and MOFTEC to discuss Dalian and CNIGC. ITA Pub. Doc. 458. It is clear that for purposes of corporate control, Respondents answered the questionnaires correctly and Commerce, in conjunction with other record evidence, reasonably agreed that no governmental control is involved. As for a relationship of any sort with the government, Respondent CMC, for example acknowledges that it "reports the results of its senior management selection to [MOFTEC] for registration purposes only." A.R. Fiche No. 102, at 000015.

tigations operate independently of each other and of government entities with respect to their exports of the subject merchandise." *Id.*

Thus, despite Plaintiff's arguments, the Court finds that there is sufficient evidence on the record to support Commerce's determination of an absence of *de jure* and *de facto* governmental control for the relevant Respondents.

F.

THE ITA DETERMINATION TO ASSIGN SELECTED RESPONDENTS' AVERAGE MARGINS TO NON-SELECTED RESPONDENTS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IN ACCORDANCE WITH LAW.

In general, the antidumping law requires Commerce to calculate the estimated weighted average dumping margin for each exporter and producer individually investigated. 19 U.S.C. § 1673d(c)(1)(B)(i)(I) (1994); 19 U.S.C. § 1677f–1(c)(1) (1994). As an exception, however, 19 U.S.C. § 1677f–1 expressly permits the use of sampling and averaging.[26] The relevant section provides that:

> If it is not practicable to make individual weighted average dumping margin determinations * * * because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

19 U.S.C. § 1677f–1(c)(2) (1994).

This section was added by the URAA, and remains consistent with the broad authority granted to Commerce in selecting sampling methodologies. *See* Statement of Administrative Action Accompanying the URAA, H.R. Doc. No.103–316, at 872 (1994) ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4200–01;[27] *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1158 (Fed. Cir. 1994) (granting discretion to Commerce in deciding when to average prices); *Federal-Mogul Corp. v. United States*, 918 F. Supp. 386, 403–04 (CIT 1996) (granting broad discretion in sample selection methodology).

In such cases, 19 U.S.C. § 1673d(c)(1)(B)(i)(II) (1994) specifies that Commerce shall "determine, in accordance with paragraph (5), the estimated all-others rate for all exporters and producers not individually in-

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[26] 19 U.S.C. § 1677f–1(a) (1994) states, in pertinent part, that "the administering authority may— (1) use averaging and statistically valid samples, if there is a significant volume of sales of the subject merchandise or a significant number or types of products, and (2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise."

[27] 19 U.S.C. § 3512(d) (1994) provides that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application."

vestigated * * *." Paragraph 5 of that section establishes the method for determining the estimated all-others rate. "[T]he estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined * * * on the basis of facts available." 19 U.S.C. § 1673d(c)(5)(A) (1994).[28] However, "[i]f the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins," or based entirely on facts available, "the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." 19 U.S.C. § 1673d(c)(5)(B) (1994).

With exporters from a NME, however, Commerce's practice is to presume all exporters are under the control of the central government until they affirmatively demonstrate a *de jure* and *de facto* absence of government control. This approach was first announced in *Final Determination of Sales at Less Than Fair Value; Sparklers from the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (1991) and has been consistently upheld by this Court and the Federal Circuit. *Air Products and Chemicals*, 14 F. Supp.2d at 741–42; *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). Commerce investigates each exporter individually, including those requesting separate rates, based on the "presumption that each is part of a single entity whose pricing practices are controlled by the government." Zalok Memo, ITA Pub. Doc. 170 at 3. Those exporters who do not respond or fail to prove absence of *de jure*/*de facto* control are assigned the country-wide rate. Therefore, a NME exporter normally receives one of two rates: either the separate rate for which it qualified or a country-wide rate. *Transcom*, 5 F. Supp.2d at 990. This approach obviates the need for an "all-others" rate calculation.

The case at bar involves exports from a NME. Commerce assigned dumping margins to three categories of Respondents:

> (1) Respondents proving an absence of government control received separate *company-specific rates;*
>
> (2) Respondents responding fully to questionnaires but not investigated received averaged non-adverse "all others" rates; and
>
> (3) Respondents not qualifying for separate rates or not responding to questionnaires received the China-wide rate based on adverse facts available.

See Final Determinations.

Initially, Commerce anticipated receiving twenty-six complete responses to questionnaires.[29] Zalok Memo, ITA Pub. Doc. 170 at 1.

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[28] Under pre-URAA practice, Commerce included margins determined on the basis of facts otherwise available (formerly "best information available") when calculating the all-others rate. SAA at 873, 1994 U.S.C.C.A.N. at 4201.

[29] Sixteen (16) responses in the rotor investigation and ten (10) responses from the drum investigation. Zalok Memo, ITA Pub. Doc. 170 at 1.

Because of the administrative burden associated with investigating twenty-six companies, Commerce decided to limit the number of investigated Respondents to seven in the brake rotors investigation[30] and five in the drum investigations.[31] *Id.* at 4 ("Due to the administrative burdens and the limited resources available to the Department, we recommend limiting our complete analysis in these cases * * *."). Consistent with the statutory provisions, Commerce selected as Respondents to investigate those Respondents with the largest sales volumes. *Id.* Those Respondents not selected also submitted full responses to the questionnaires and requested separate company-specific rates. Those Respondents that did not submit a questionnaire response or could not qualify for separate rates were assigned a China-wide rate based on adverse facts available. *Final Determinations* at 9162.

After investigating the selected Respondents and finding all but two qualified for separate rates, Commerce concluded that an averaged margin based on the selected Respondents should be assigned to the fully cooperative but uninvestigated Respondents. *Id.* at 9173–74. Commerce reasoned that it would be inappropriate to assign a rate based on adverse "facts available" that would also apply to PRC exporters who refused to cooperate. *Id.* at 9173–74.

For brake rotor non-selected Respondents,[32] Commerce "assigned * * * a weighted-average dumping margin based on the calculated margins of the selected brake rotors respondents, excluding margins which were zero, de minimis or based on facts available." *Id.* at 9174. For brake drum non-selected Respondents,[33] Commerce "assigned * * * a rate which is the simple average of the dumping margins determined for the exporters and producers individually investigated." *Id.* Commerce did not include selected brake drum Respondent, CNIGC's rate based on facts available in the calculation because Commerce does "not consider that a weighted-average which includes that company's adverse facts available rate is reasonably reflective of potential dumping margins for cooperative non-investigated exporters or producers who submitted full questionnaire responses." *Id.* at 9173–74.[34] Commerce's methodology for calculating margins for these non-selected Respondents was based on the statutory provisions outlining the all-others rate calculation found in 19 U.S.C. § 1673d(c)(5) (1994). *Id.* at 9173.

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[30] Those Respondents are: Dalian Norinco, China National Automotive I/E Corp. and its U.S. subsidiaries, Laizhou CAPCO and CAPCO USA, Shenyang Honbase Machinery Co., Ltd., Yantai Import & Export, Guangzhou Norinco, Southwest Technical Import & Export Corp. and Xinjiang Machinery Import & Export Corp. Zalok Memo, ITA Pub. Doc. 170 at 4.

[31] Those Respondents are: Yantai Import & Export, Guangzhou Norinco, Qingdao Metal & Minerals, XCY, and China Machinery Corp. Zalok Memo, ITA Pub. Doc. 170 at 4.

[32] These Respondents are: Hebei Metals and Machinery Import & Export Corp., Jilin Provincial Machinery & Equipment Import & Export Corp., Jiuyang Enterprise Corp., Longjing Walking Tractor Works Foreign Trade Import & Export Corp., Qingdao Metals, Minerals & Machinery Import & Export Corp., Shanxi Machinery and Equipment Import & Export Corp., Xianghe Zichen Casting Corp. and Yenhere Corp. *Final Determinations* at 9174.

[33] These Respondents are: CAIEC/Laizhou CAPCO, Hebei Metals and Machinery Import & Export Corp., Jiuyang Enterprise Corp., Longjing Walking Tractor Works Foreign Trade Import & Export Corp. and Shanxi Machinery and Equipment Import & Export Corp. *Final Determinations* at 9173.

[34] As discussed earlier, CNIGC, a selected Respondent, requested a separate rate but did not carry its burden of proving an absence of state control. Accordingly, Commerce assigned it the China-wide rate. *Final Determinations* at 9166.

Plaintiff argues that Commerce should have assigned the non-investigated Respondents the China-wide rate of 86.02% for drums and 43.32% for rotors. Plaintiff's Brief at 24. Specifically, Plaintiff contends that since the non-selected Respondents were never verified by Commerce, they should have received the China-wide rate. *Id.* at 25 ("This procedure of not verifying information from a non-selected Respondent is not in accordance with law."). In addition, Plaintiff argues that the analogous use of 19 U.S.C. § 1673d(c)(5) is not appropriate since the statute deals with the calculation of an "all others" rate in market economy cases only. Plaintiff's Reply Brief at 12. Moreover, it claims, the "assignment of non-adverse, average rates to the non selected respondent is not a reasonable interpretation of 19 U.S.C. § 1673d(c)(5), especially for the ITA's assignment of the simple average rate for drum non selected Respondents." *Id.*

Commerce's assignment of an averaged non-adverse margin to the non-selected Respondents is supported by substantial evidence and in accordance with law. As a threshold matter, Commerce's decision to resort to averaging due to the administrative burden is in accordance with law.[35] "The purpose of 19 U.S.C. § 1677f–1 is to permit Commerce to use sampling methodologies when necessary due to the volume of sales involved. The legislative history shows that the purpose of § 1677f–1 is to "'to reduce the costs and administrative burden on the Department of Commerce of determining dumping margins * * *.'" *Federal-Mogul Corp.*, 918 F. Supp. at 404 (quoting H.R. Rep. 98–725 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4910, 5173). Commerce did not err by not verifying the non-selected Respondents.[36]

The second issue raised by Plaintiff is whether Commerce's assignment of an "all others" average rate to NME exporters, who were not required to prove their entitlement to separate rates, comports with substantial evidence and is in accordance with law. Plaintiff concedes that the "ITA has discretion to establish the estimated 'all others' rate for exports and producers not individually investigated," but argues "that discretion is limited by the concept of reasonableness * * *." Plaintiff's Reply Brief at 11. Indeed, Chevron teaches that "if the statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Where the agency's interpretation of a statute represents a reasonable accommodation of manifestly competing interests, it is entitled to deference. *Id.* at 865. "Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of

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[35] Commerce discussed the large number of exporters as well as its current staffing and office caseload restrictions. *See* Zalok Memo, ITA Pub. Doc. 170 at 3.

[36] As Defendant notes, Commerce never used unverified information to calculate the margins for the non-selected Respondents. The margins used were based upon the verified data of the selected Respondents.

In addition, if Plaintiff's argument that the ITA erred by failing to verify all the non-selected Respondents' information was valid, the sampling/averaging statutes would have no purpose. Such a result is to be avoided, if possible, under standard rules of statutory construction. *See* Norman J. Singer, 2B Sutherland Stat. Const., §51.02 (5th ed. 1992).

those laws and regulations." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1133, 899 F. Supp. 632, 635 (1995) (citing *PPG Industries v. United States*, 13 CIT 297, 299, 712 F. Supp. 195, 198 (1989), *aff'd*, 978 F.2d 1232 (Fed. Cir. 1992); *compare with Haggar Apparel Co. v. United States*, 938 F. Supp. 868 (CIT 1996) *aff'd*, 127 F.3d 1460 (Fed. Cir. 1997) (no Chevron deference in customs cases), *cert. granted*, 119 S.Ct. 30 (1998).

The statute's silence mandates a reasonableness analysis of statutory interpretation of assignment of an "all-others" averaged rate to non-selected NME Respondents. As an initial matter the Court finds without support Plaintiff's argument that 19 U.S.C. § 1673d(c)(5) (1994) only applies to market economies. "[T]he amended provisions [of 19 U.S.C. §§ 1671d(d)(1)(B)(i) and 1671d(c)(1)] nonetheless indicate Congressional support for the 'all others' rate without distinction for NME or non-NME contexts." *UCF America Inc. v United States*, 919 F. Supp. 435, 441 (CIT 1996). Indeed, the legislative history makes no such mention of any distinction.

Although there are no cases from this Court directly on point,[37] Commerce in *Notice of Preliminary Determination of Sales at Less Than Fair Value: Honey from the People's Republic of China*, 60 Fed. Reg. 14725, 14729–30 (March 20, 1995) ("Honey") squarely addressed this issue. *See also Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Preserved Mushrooms from the People's Republic of China*, 63 Fed Reg. 41794, 41797–98 (Aug. 5, 1998). Commerce, in *Honey*, first confronted the situation where administrative constraints prevented it from fully investigating NME Respondents who complied fully with questionnaire requests. Prior to that determination, Commerce, generally, had been able to individually investigate all producers/exporters because of the small number of Respondents involved. *See* ITA Pub. Doc. 170 at 3. Given this unique situation, Commerce reasoned:

> Because it would not be appropriate for the Department to refuse to consider an affirmative documented request for an examination of whether these companies were independent of any non-respondent firms and then assign to the cooperative firms the rate for the non-cooperative firms, which in this case is an adverse margin based on best information available, the Department has assigned a special single rate for these firms.

60 Fed Reg. at 14729–30.

[37] While not in direct conflict, the Court notes the arguable tension created by its holding here with the Court's reasoning in *Transcom v United States*, 5 F. Supp.2d (CIT 1998). In *Transcom*, the Court found reasonable Commerce's decision to "assign a country-specific rate to a NME company that was not individually notified by Commerce, or its government, that its merchandise may be covered by a pending antidumping investigation." *Id.* at 989. After relying on the NME presumption enunciated above, the Court stated that:

> [B]ecause all exporters or producers, at least in theory, have been reviewed, the calculation of an all others rate is unnecessary. While this procedure is admittedly at odds with the letter of Commerce's own regulations requiring the review, upon request, of specific individual producers, muddling the CAFC's endorsement of the NME presumption would undermine Commerce's administration of the dumping law on NME entities, a task that is inherently difficult, and render the NME presumption impotent."

Id. at 990. The case at bar, however, is distinguishable. *Transcom* involved solely the issue of notice in NME cases. Here, the Respondents received notice of the pending investigation, and complied fully with all of Commerce's requests for information. The Respondents, thus should have been fully verified and given an opportunity to demonstrate lack of government control, but could not due to Commerce's own administrative constraints, a situation for which there is a clearly defined statutory exception.

The ITA's reasoning in *Honey* has the weight of fairness and common sense. It would be inequitable if Commerce were to assign an adverse facts available rate to these Respondents. *Cf., Nat'l. Knitwear & Sportswear Assoc. v. United States*, 15 CIT 548, 558, 779 F. Supp. 1364, 1372–73 (1991) (holding that the application of a punitive, or even quasi-punitive, rate to innocent parties would be contrary to the intent that the antidumping law be remedial).

Commerce's approach also comports with purpose of the new statutory scheme under the URAA which is "designed to prevent the unrestrained use of facts available as to a firm which makes its best effort to cooperate with the Department." *Borden*, 4 F. Supp.2d at 1245. Commerce, faced with an inability to investigate all cooperating Respondents, reasonably devised a methodology for calculating a fair rate.

Moreover, the calculation of the "all others rate" applied by Commerce to the non-selected Respondents is statutorily defined in 19 U.S.C. § 1673d(c)(5) (1994). Commerce's calculation of the rate for non-selected brake rotors is reasonably based on Section 1673d(c)(5)(A)'s mandate to use the weighted average of the estimated weighted average dumping margins established for exporters individually investigated, excluding any zero and *de minimis* margins and any margins determined by facts available.

Similarly, Commerce's calculation of the non-selected brake drums rate is reasonably based on Section 1673d(c)(5)(B) which gives Commerce the authority to use any reasonable method where the estimated weighted average dumping margins for all exporters individually investigated are zero or *de minimis* or based entirely on facts available. While the statute also suggests the use of "averaging the estimated weighted average dumping margins determined for the exporters individually investigated" in these situations, the SAA specifies that if this approach "results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." SAA at 873, 1994 U.S.C.C.A.N. at 4201.

Accordingly, the Court finds Commerce's assignment to the non-investigated brake drums Respondents of a rate which is the simple average of the dumping margins determined for the exporters individually investigated is supported by substantial evidence. Since the rates in this case for all the selected brake drums Respondents were either zero or based entirely on facts available, Commerce had a reasonable basis to assign the non-selected Respondent rates. In accordance with the SAA's mandate not to use reasonably unreflective data, Commerce did not include selected brake drum Respondent CNIGC's rate, based on facts available in the calculation. *See Nat'l. Knitwear & Sportswear Assoc.*, 15 CIT at 558–59, 779 F. Supp. at 1372–73 (affirming Commerce's exclusion of BIA rates from "all others" rate where rates are not representative of pricing practices).

Thus the Court finds reasonable Commerce's determination to assign the non-investigated Respondents a non-adverse "all others" rate.

G.

THE ITA'S CRITICAL CIRCUMSTANCES DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IN ACCORDANCE WITH LAW.

Generally, antidumping duties are imposed on entries of merchandise made on or after the date on which the Secretary first imposes provisional measures—usually the date on which notice of an affirmative preliminary determination is published in the Federal Register. 19 CFR § 351.206 (1998). Commerce's regulations, however, additionally allow a petitioner to allege the existence of critical circumstances in its petition. If critical circumstances are found to exist, duties may be imposed retroactively on merchandise entered up to 90 days before the imposition of provisional measures. *See* 19 U.S.C. 1673b(e) (1994).[38]

Where a party alleges critical circumstances, Commerce must determine whether:

> (A)(I) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or
> (ii) the person by whom or for whose account, the merchandise was imported knew or should have known that its exporter was selling the subject merchandise at less than fair value *and* that there would be material injury by reason of such sales, *and*
> (B) there have been massive imports of the subject merchandise over a relatively short period.

19 U.S.C. § 1673d(a)(3) (1994) (emphasis added).[39]

In this case, Commerce conducted its analysis under Section 1673d(a)(3)(A)(ii) (1994) because there is no history of dumping and material injury by reason of dumped imports for either brake drums or rotors. *Final Determinations* at 9164. Commerce concluded that it could not find importer knowledge of material injury as to the brake drums,[40] and therefore, did not examine the other critical circumstances criteria.

[38] This provision is "designed to address situations where imports have surged as a result of the initiation of an antidumping or countervailing duty investigation, as exporters and importers seek to increase shipments of the merchandise subject to investigation into the importing country before an antidumping or countervailing duty order is imposed." S. Rep. No.103–412 (1994).

[39] Under the pre-URAA practice, critical circumstances existed if Commerce found massive imports of the subject merchandise over a relatively short period of time prior to the suspension of liquidation and (1) there is either a history of dumping or (2) the importer knew or should have known that the exporter was selling the merchandise at less than fair value. 19 U.S.C. § 1673d(a)(3) (1988). Commerce did not require the "likelihood of material injury" prong.

[40] The URAA and SAA are silent as to how Commerce should make a finding of knowledge of material injury. Therefore, Commerce is afforded reasonable discretion in formulating a methodology. *Chevron*, 467 U.S. at 843.

In order to determine importer knowledge of material injury, Commerce looks to the preliminary finding of the International Trade Commission (ITC). Where a preliminary ITC finding of present material injury is made, the ITA concludes that an exporter knew or should have known that such imports would cause injury. *Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 62 Fed. Reg. 61,964, 61,967 (1997). In contrast, if the ITC makes solely a preliminary threat of material injury finding, Commerce concluded in the *Final Determinations* at issue that it is not reasonable to conclude that an importer knew or should have known that its imports would cause material injury." *Id.* (citing Decision Memorandum Regarding Imputed Knowledge of Material Injury at 4, Administrative Record, Fiche No. 88, Frame No. 1 ("it would be difficult to justify a presumption of knowledge")). Subsequent Commerce Determinations, however, have clarified that although "[Commerce] would normally not find knowledge of injury" with only a preliminary threat finding, where the "magnitude of the margins and increase in imports are so great * * * the importer knew or should have known that these sales of subject merchandise to the U.S. would cause material injury." *Notice of Final Determination of Sales Than Fair Value:*

Continued:

Id. at 9165. Consequently, Commerce made a negative critical circumstances determination for brake drums.

As for brake rotors, Commerce concluded that no critical circumstances existed for the selected Respondents because it could not find importer knowledge of dumping as to all the Respondents except Southwest. *Id.*[41] Commerce, however, did not make a critical circumstances determination as to Southwest because its imports had not been massive. *Id.*

Similarly, Commerce declined to find critical circumstances for the non-selected but fully cooperating Respondents. Using the same rationale applied to the assignment of non-adverse margins, Commerce concluded that it is "inappropriate to find critical circumstances with respect to respondents whose individual data have not been analyzed due to the Department's own administrative constraints." *Id.*[42]

Plaintiff contests Commerce's failure to request shipment information from the non-investigated Respondents to determine and analyze any existence of massive imports. In the alternative, Plaintiff argues that "if full investigation of non selected respondents is not possible, critical circumstance should be found to exist based on China wide rates and on 'facts available.'" Plaintiff's Brief at 27 (emphasis in original).

The Court rejects Plaintiff's argument. Commerce did not request shipment information from the non-selected Respondents because it did not have the administrative support to analyze or review it. *See Notice of Preliminary Critical Circumstances Determination: Honey from the People's Republic of China*, 60 Fed. Reg. 29,824, 29,825 (1995). More importantly, however, since the Court has affirmed Commerce's decision to assign a non-adverse "all others" rate to non-investigated Respondents, Commerce could not impute knowledge of dumping to these Respondents based on the margins calculated for them. These margins were less than 15% for CEP sales and 25% for EP sales. Accordingly, Commerce's decision not to request shipment information was in accordance with law since Commerce did not need to determine if the third

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Certain Cut-To-Length Carbon Steel Plate from the Russian Federation, 62 Fed. Reg. 61,787, 61,793 (1997); *Preliminary Determination of Sales at Less Than Fair Value; Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 Fed. Reg. 31,958, 31,962 (1997) (finding knowledge of material injury with only threat of material injury finding when coupled with 45% increase in volume and 99.59% and 176.76% margins).

This Court has yet to rule on the reasonableness of Commerce's methodology in determining importer knowledge of material injury, and the issue is not presented in this case. Commerce's approach seems reasonable, however, because the test satisfies the legislative mandate for importer knowledge. "[T]he general public, including importers, is deemed to have notice of th[e] [material injury] finding[s] as published in the Federal Register." *Final Determination of Sales at Less Than Fair Value; Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 62 Fed. Reg. 61,964, 61,967 (1997).

Although there is no evidence in the record indicating that after the ITC's preliminary threat of material injury finding concerning brake drums, Commerce additionally examined the magnitude of the margins and volume of imports under its articulated standard, Commerce would not have found critical circumstances as no importer knowledge of dumping existed "[s]ince the company-specific margins in the final determinations for brake drums * * * are below 15 percent for [constructed export price] sales and below 25 percent for [export price] sales." *Final Determinations* at 9165.

[41] Commerce's normal practice is that it will impute knowledge of material injury where the margins are above 15% for Constructed Export Price ("CEP") sales and above 25% for Exported Price ("EP") sales. *Final Determination of Sales at Less Than Fair Value: Certain Cut Length Carbon Steel Plate from the People's Republic of China*, 62 Fed. Reg. 61,964 (1997); *Preliminary Critical Circumstances Determination: Honey from the People's Republic of China*, 60 Fed. Reg. 29,824 (1995); *Final Determination of Sales at Less Than Fair Value; Silicon Metal from China*, 56 Fed. Reg. 18,570 (1991).

[42] In contrast, Commerce imputed knowledge of dumping, and of material injury, and presumed massive imports of brake rotors, to the China-wide entity based on facts available. *Final Determinations* at 9165.

criterion, massive imports, existed. *Preliminary Determinations of Critical Circumstances; Brake Drums and Brake Rotors from the People's Republic of China*, 61 Fed. Reg. 55,269, 55,270 (1996) ("[I]t is not necessary to consider whether there have been massive imports since we found there was no history of dumping or importer knowledge.").

Moreover, Plaintiff's authority for the proposition that Commerce should use facts otherwise available to calculate critical circumstances is inapposite. Plaintiff cites to *Saha Thai Pipe Steel Co., Ltd. v. United States*, 17 CIT 727, 828 F. Supp. 57 (1993), for the proposition that "this Court has ruled that there is a preference for the employment of country wide rates by the agency when faced with administrative constraints." Plaintiff's Brief at 27–28. While it is true that the pre-URAA statute, 19 U.S.C. § 1671e(a)(2) (1988),[43] relied on by the Court in *Saha Thai Pipe Steel Corp.*, 828 F. Supp. at 736, and related case law,[44] created a presumption in favor of applying country-wide countervailing duty rates, the statute only applies to the assessment of countervailing duties. *There is no parallel antidumping statute.*[45] As the Federal Circuit noted, in the context of 19 U.S.C. § 1671e(a)(2) (1988), "'[u]nlike the antidumping law, which is directed to company-specific activity, the countervailing duty law is directed at government or government-sponsored activity.'" *Ipsco*, 899 F.2d at 1197 (citation omitted).

In addition, Congress has repealed the statute which created a presumption for country-wide rates and which was relied upon in the cases cited by Plaintiff. The URAA "designates § 1671e(a)(3) as § 1671e(a)(2), and strikes former § 1671e(a)(2)." *Geneva Steel*, 914 F. Supp. at 616, n.72. The legislative history specifically states that "Section 265 complements section 265 by eliminating the current presumption in section 706(a) of the 1930 Tariff Act favoring country-wide subsidy rates." S. Rep. No. 103–412, at 242 (1994).

Plaintiff also cites to *Usinor Sacilor v. United States*, 907 F. Supp. 426 (CIT 1995) for the holding that "this Court has recognized the applicability of neutral BIA even when cooperative respondent substantially complies with information requests and where any deficiencies arise from factors beyond respondents [sic] control." Plaintiff's Brief at 28. That case does not support Plaintiff's argument. Plaintiff calls for the application of the China-wide rate which, as noted by Defendant-Intervenors, is based on an adverse facts available rate. *Usinor Sacilor* explicitly rejected usage of this type for a Respondent who had substantially complied with Commerce's data request. 907 F. Supp. at 429 ("[T]he court finds that Commerce's inclusion of the highest non-aberrant margin in the weighted average calculated margin is improper.").

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[43] 19 U.S.C. § 1671e(a)(2) (1988) provides that the administering authority shall publish a countervailing duty order which "shall presumptively apply to all merchandise of such class or kind exported from the country investigated • • •." Commerce may, however, determine a company-specific rate where either (A) a significant differential between companies receiving subsidy benefits exists or (B) a State-owned enterprise is involved.

[44] *Kajaria Iron Castings Pvt. Ltd v. United States*, 156 F.3d 1163, 1177 (Fed. Cir. 1998); *Ipsco, Inc. v. United States*, 899 F.2d 1192, 1197 (Fed. Cir. 1990); *Geneva Steel v. United States*, 914 F. Supp. 563, 618–19 (CIT 1996).

[45] *Compare* 19 U.S.C. 1671e(a) (Assessment of Duty: Publication of Countervailing Duty order) *with* 19 U.S.C. 1673e(a) (Assessment of Duty: Publication of Antidumping Duty).

The Court finds Commerce's determination finding no critical circumstances as to the non-investigated Respondents is supported by substantial evidence and in accordance with law.

H.

ITA SELECTION OF SURROGATE VALUES FROM INDIA

Commerce calculates an antidumping margin by comparing an imported product's price in the United States to the normal value of comparable merchandise. 19 U.S.C. § 1677(35)(A) (1994). Normal value typically equals the domestic price of the product in the exporting country. 19 U.S.C. § 1677b(a)(1)(B) (1994). When the subject merchandise, however, is exported from a NME, the domestic sales may not be reliable indicators of market value. In such instances, Commerce determines normal value by 1) isolating each factor of production process in the NME country, 2) choosing a surrogate market economy country at a comparable level of economic development that produces comparable merchandise, 3) assigning a value to each factor of production equal to its cost in the surrogate country and 4) adding to those values an estimated amount for profit and general expenses. 19 U.S.C. § 1677b(c) (1994); *Air Products and Chemicals*, 14 F. Supp.2d at 745. "[T]he valuation of the factors of production shall be based on the best available information[46] regarding the values of such factors in a market economy or countries considered to be appropriate. * * *" 19 U.S.C. § 1677b(c)(1) (1994).

In response to Commerce's request for additional PAI, Respondents submitted information from six surrogate Indian producers on overhead, interest, depreciation and profit. Letter from White & Case to Secretary of Commerce of 1/10/97, ITA Pub. Doc.443; A.R., Fiche Nos. 69–73. In calculating normal value, Commerce used the Indian factory overhead costs provided by Respondents as a surrogate for Chinese producers' overhead. In the *Final Determinations*, Commerce explained that it did not use data from the Indian producer, Shivaji, as it had in the *Preliminary Determinations*, because "publicly available information, along with information from the U.S. consulate in India, establishes

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[46] The Court notes that the term "best available information" ("BAI") is distinguished from the term "best information available"("BIA"). *Union Camp Corp.*, 941 F. Supp. at 116. A number of cases, however, in dicta, describe the statute's mandate to use BAI as requiring the use of "best information available." *See e.g., Olympia Industrial, Inc. v. United States*, 7 F. Supp.2d 997, 1000 (CIT 1998) ("From the statute, it is clear that Commerce must identify and use the best information available when it values the factors of production."); *Nation Ford Chem. Co. v. United States*, 985 F. Supp. 133, 134 (CIT 1997), *aff'd*, ____ F.3d ____, 1999 WL 50475 (Fed. Cir. 1999) ("The purpose of the procedure is to construct the product's price as it would have ben if the NME country has been a market economy, using the best information available regarding surrogate values.").

19 U.S.C. 1677b(c)(1)'s mandate to use best available information speaks to the quality of the information relied upon by Commerce when choosing valuation data in relation to a NME and fulfills the statutory purpose to facilitate the determination of dumping margins as accurately as possible. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Commerce uses best information available "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation," 19 U.S.C. § 1677e(c) (1988), or if Commerce is unable to verify the accuracy of the information submitted, 19 U.S.C. § 1677e(b) (1988). Additionally, Commerce's regulations further specify that it will use BIA when the party being investigated does not give a complete, accurate, and timely response to Commerce's request for factual information. 19 C.F.R. § 353.37(a)(1) (1995).

While the terminology may have caused confusion, the Court notes that similar issues should not arise in post-URAA cases as the BIA terminology has now been denominated "facts otherwise available."

that Shivaji did not produce subject merchandise during the POI." *Final Determinations* at 9168.

Plaintiff argues that it should have had an opportunity to respond to Respondents' PAI submission. Plaintiff's Brief at 29. Plaintiff also argues that the ITA erred by failing to verify this "PAPI."[47] *Id.* Thus, Plaintiff contends that the ITA's reliance on this information is not supported by substantial evidence because the "ITA does not have the discretion to rely on evidence that is not a reasonable alternative." *Id.* Finally, Plaintiff argues that the ITA should have used Indian producer financial statements from Shivaji and Rico Auto Industries Limited ("Rico") as it did in the preliminary determination instead of the Indian manufacturers, Jayaswals, Kalyani Brakes Limited, Krishna Engineering Works, and Nagpur Alloy Castings Limited. *Id.*

In contrast, Defendant argues that Commerce need not verify the Indian PAI submitted by Respondents because Commerce is required to conduct verifications or "'on-the-spot investigations'" in the territory of only the "'exporting Member.'" Defendant's Response at 27–28.[48] Since India is not an exporting member for purposes of this investigation, Defendant claims that a verification is not required. *Id.* at 28.

The Court finds that Commerce's decision to use Respondents' PAI is supported by substantial evidence and in accordance with law.[49]

As to the verification of PAI, a review of the record below reveals that Plaintiff failed to raise this issue before Commerce, and, therefore, the Court is precluded from addressing it. *See* Petitioner's Pre-Hearing Brief.[50] It is well established that "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not therefore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946).[51]

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[47] In relevant part, 19 U.S.C. § 1677m(i) (1994) states "[t]he administering authority shall verify all information relied upon in making—(1) a final determination in an investigation. * * *"

[48] Defendant cites to Article 6.7 and Annex I of the Antidumping Code discussing verification of "exporting members." However, in the SAA, "Part C. Action Required Or Appropriate to Implement the Antidumping and Subsidies Agreements", the SAA discusses verification in a "foreign country." SAA at 868, 1994 U.S.C.C.A.N. at 4197. Specifically, the SAA states that "[t]he regulations will provide that Commerce will verify information in a **foreign country** only after: (1) obtaining agreement from the persons whose information will be examined; and (2) notifying the foreign government concerned of the details of the verification." *Id.* The SAA does not clearly state that the verification should only occur as to an exporting member .

However, the SAA also states that the procedural rules under the Antidumping Code for verifications balance "the investigating country's need for information, the exporting country's sovereignty, and the investigated parties' need for reasonable advance notice." SAA at 813, 1994 U.S.C.C.A.N. at 4156. Thus, the legislative history seems to impliedly assume verification only in the exporting member's territory.

[49] The Court has already analyzed Plaintiff's argument regarding the submission of rebuttal PAI and found no evidence in the record indicating an attempt by Plaintiff to submit rebuttal PAI.

[50] Plaintiff conceded at oral argument that it failed to raise this argument below.

[51] In this case, Commerce, implementing the NME procedure outlined above, chose India as a surrogate market economy resorted to PAI from Indonesia where surrogate prices from India could not be obtained. Memorandum from The Team to The File of 2/21/97, ITA Pub. Doc. 494 at 1. Commerce, relying on the surrogate information submitted by Respondents, valued the factors of production consistent with its policy of using PAI. *Id; see Magyar Gordulocsapagy Muvek v. United States*, 19 CIT 921, 926, 890 F. Supp. 1111, 1116 (1995). Because Plaintiff failed to raise the issue of verification below, there is no related record for the Court to review regarding Plaintiff's argument.

Continued

Regarding Plaintiff's argument that Commerce failed to use Shivaji and Rico surrogate data in the *Final Determinations*, the Court notes that Commerce is not bound to use the same surrogate value information in the preliminary and final determination. *NEC Corp. v. United States*, 978 F. Supp. 314, 318 (CIT 1997) ("Commerce re-examines its analysis between the preliminary and the final determination.") *aff'd.* 151 F.3d 1361 (Fed. Cir. 1998).

Commerce also reasonably rejected data from Shivaji since the record evidence indicates Shivaji did not manufacture drums or rotors during the POI. ITA Pub. Doc. 494 at 18; *Union Camp Corp. v. United States*, 941 F. Supp. at 116 ("Generally, Commerce will select, where possible, publicly available published value which is * * * representative of a range of prices within the POI")

Commerce did, however, rely on information from Rico. *Final Determinations* at 9168 ("Based on publicly available information, we find that * * * Rico produced both brake drums and brake rotors within the scope of these investigations and sold during the POI. Therefore, we are using these Indian producers' financial reports to calculate surrogate percentages for use in both investigations."). Accordingly, Plaintiff's argument on that point is factually incorrect.

I.

ITA Selection Of Surrogate Values For Castings Of Respondent Shenyang And Selection Of Surrogate Values For Various Factors Of Production Is Supported By Substantial Evidence.

As discussed earlier, Commerce values the factors of production in a NME "based on the best available information regarding the values of such factors in a market economy country." 19 U.S.C. § 1677b(c)(1) (1994). Since the statute does not specify what constitutes best available information, these decisions are within Commerce's discretion. Accordingly, Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of produc-

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Whether Commerce must verify PAI when used as surrogate values has not been directly addressed in this Court. *Cf. Ipsco v. United States*, 12 CIT 1128, 1133, 701 F. Supp. 236, 240–241 ("ITA may use generally available public information, such as IRS tables, * * *."). The Court notes that Commerce has shown support for the proposition that publicly available *valuation* data need not be verified. *Proposed Rules: Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,324 (1998) ("Because publicly available valuation data is not verified, * * *."); *cf. Rules and Regulations: Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,332 (1997) (allowing use of factual information already on the record or *information in the public realm* to comment on verification report; submission of new factual information at this stage is inappropriate as it is not verified); *Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China*, 57 Fed. Reg. 21,058, 2,1062 (1992) (discussing reliability of publicly available factor price information).

Although the 1988 legislative history does not directly address this issue, the drafters noted that "[i]n valuing such factors [of production], Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices. However, conferees do not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time." H.R. Conf. Rep. No. 100–576 (1988) *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623. Reference to the 1988 legislative history is made as the URAA did not change this aspect of the antidumping statute. *Compare* 19 U.S.C. § 1677b(c) (1988) *with* 19 U.S.C. § 1677b(c) (1994).

It should be noted that where surrogate values selected by Commerce are used as BIA, or facts available, the data need not be verified. It is well-established that the BIA rule is exempted from the scope of 1677e(a)'s mandate that Commerce verify all data on which it relies. *Timken Co.*, 12 CIT at 961, 699 F. Supp. at 305 ("It is thus permissible for Commerce to employ unverified data from the designated surrogate as the "'best information otherwise available'" * * *."); *Ansaldo Componenti v. United States*, 10 CIT 28, 34, 628 F. Supp. 198, 203 n.3 (1986) ("The 'best information rule' is an explicit exception to the verification requirement.") (citing 19 U.S.C. § 1677e(a)).

tion as long as it was a reasonable way. *Shieldalloy*, 947 F. Supp. at 532. When an agency's method is challenged,

> The proper role of this court, * * * is "to determine whether the methodology used by the [agency] is in accordance with law," and as "long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology."

GMN Georg Muller Nurnberg AG v. United States, 15 CIT 174, 178, 763 F. Supp. 607, 611 (1991) (citing *Ceramica Regiomontana, S.A. v United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 965–66 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987)).

In choosing the factors of production, Commerce valued raw and semi-finished castings for Respondent Shenyang based on the Indian foundry Jayaswals, having found "Jayaswals financial statements provide the only appropriate Indian surrogate value for unfinished castings on the record." *Final Determinations* at 9171. Additionally, Commerce valued pig iron and steel scrap based on the "separated line item prices for each of these inputs in [Indian producer] Shivaji's 1995–96" financial report. *Id.* at 9169. Commerce also valued steel sheet and steel wire rod from the Indian publication, Steel Authority for India Limited ("SAIL"). *Id.* at 9163.

Plaintiff argues that the "[t]he ITA's decision to assign to Shenyang a surrogate value for purchased castings based on Jayaswals values was contrary to law because such values do not indicate production comparable to the rotors subject to these investigations." Plaintiff's Brief at 29. For support, Plaintiff contends that the ITA stated that Jayaswals' financial statements do not indicate whether it purchases raw, semi-finished or finished castings. *Id.* at 30 (citing ITA Pub. Doc. 494 at 17). Plaintiff asserts that Commerce should have used value data from Shivaji, which is a producer of unfinished and semi-finished castings. *Id.*

For valuation of pig iron, steel sheet, steel wire rod and steel scrap, Plaintiff argues that Commerce should have used data from the *Monthly Statistics of Foreign Trade of India, (Import) Vol. II*, from April, 1995 through July, 1995. *Id.* at 12. In addition, Plaintiff argues that "[t]he ITA should have calculated the values for ferrochromium, manganese, lubrication oil, and other factors of production as they were calculated by the ITA in the *Preliminary Investigation*, ITA Pub. Doc. 340, at 53,195–196 [sic]." *Id.* at 15.

The Court finds reasonable Commerce's determination to use casting values from Jayaswals' financial statements and Commerce's valuation of pig iron, steel sheet, steel wire rod, steel scrap, ferrochromium, manganese, and lubrication oil. First, regarding casting values, the Court agrees with the Defendant's reasoning that, "despite the fact that the financial statement notes did not indicate the type of castings purchased by Jayaswals, the increased inventory values contained in the state-

ment supported an inference that the company purchased raw castings (as opposed to finished castings), making the Jayaswals' data an appropriate surrogate to value [Respondent] Shenyang's unfinished and semi-finished castings."[52] Defendant's Response at 29. Additionally, as stated earlier, Commerce rejected the casting values offered by Indian foundry, Shivaji, because they data fell outside the POI. Therefore, given the discretion afforded to Commerce by Congress, the Court, finds that the ITA's selection of Jayaswals' casting as surrogate values for Shenyang is supported by substantial evidence.

As for the valuation of pig iron and steel scrap, the Court finds Commerce's determination to utilize the 1995–1996 financial report of the Indian producer Shivaji as surrogate values to be supported by substantial evidence. Although Plaintiff asserts that Commerce should not have relied on Respondent's PAI, Commerce actually did not rely on Respondent's PAI which included the Indian publication Steel Authority for India Limited (SAIL). Instead Commerce used the Shivaji financial reports because "Shivaji produces goods which are in the same general category as the subject merchandise * * * [and] the separate line-item values * * * in Shivaji's report are more specific than the prices * * * in * * * the Indian publication Steel Authority of India Limited ("SAIL") or in the Monthly Statistics [of the Foreign Trade of India]." *Final Determinations* at 9163; *see also* ITA Pub. Doc. 494 at 4–5 (relying solely on Shivaji data because it is the only one that contains a value for iron scrap that is not combined with a value for either pig iron, steel scrap or both). Moreover, in response to Plaintiff's concern that tax excluded values be used, Commerce stated that "[w]e have also removed, where possible, any taxes included in the prices obtained from Shivaji's report." *Final Determinations* at 9169; *see also* ITA Pub. Doc. 494 at 4–5 (making the values tax exclusive). Therefore, the Court finds Commerce's valuation of pig iron and steel scrap to be supported by substantial evidence. *See* Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100–576, at 591 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1624 ("Commerce should seek to use, if possible, data based on production of the same general class or kind of merchandise * * *.").

As for steel sheet and steel wire rod, Commerce reasonably explained that the values from SAIL for these factors of production "have been recognized as a definitive domestic source in previous investigations and the prices are contemporaneous with the POI." ITA Pub. Doc. 494 at 7. As the Court stated earlier, Commerce's practice is to use publicly available values which are "representative of a range of prices within the POI," *Union Camp*, 941 F. Supp. at 116, and therefore, Commerce's decision to use values from SAIL is supported by substantial evidence and in accordance with law.

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[52] The Jayaswals financial statements indicate that the "casting purchase price is 7,733 Rupees (RS)/metric ton (MT) whereas the opening and closing stock casting values are 11,044 RS/MT and 13,767 RS/MT, respectively. Based on the above figures, it appears that this company indeed purchased raw castings and machined those castings, thereby increasing their value once they were placed in inventory." ITA Pub. Doc. 494 at 17.

Finally, Plaintiff's argument that "[t]he ITA should have calculated the values for ferrochromium, manganese, lubrication oil, and other factors of production as they were calculated by the ITA in the *Preliminary Investigation*," Plaintiff's Brief at 15, is unpersuasive. As the Court stated earlier, Commerce is not bound to use the same surrogate value information in the preliminary and the final determination. *NEC Corp.*, 978 F. Supp. at 318, *aff'd* 151 F.3d 1361 (Fed. Cir. 1998).

Accordingly, Commerce's selection of surrogate values from Jayaswals for the valuation of castings for Respondent Shenyang, and its selection of surrogate values for the valuation of pig iron, steel sheet, steel wire rod, steel scrap, ferrochromium, manganese, and lubrication oil, is supported by substantial evidence and in accordance with law.

IV.

CONCLUSION

For the foregoing reasons, Plaintiff's motion is denied and the Court affirms Commerce's 1) decision not to apply "facts available" to all Respondents; 2) solicitation of and reliance on publicly available information from Respondents; 3) rejection of part of Plaintiff's administrative case brief; 4) determination to apply separate rates for selected Respondents; 5) assignment of margins based on averaged selected Respondents to non-selected Respondents; 6) critical circumstances determination with regards to non-selected Respondents; 7) rejection of Indian surrogate values from Shivaji; and 8) use of an Indian surrogate value from Jayaswals for castings for Respondent Shenyang and selection of surrogate values for valuing pig iron, steel sheet, steel wire rod, steel scrap, ferrochromium, manganese, and lubrication oil.

(Slip Op. 99–24)

ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FLORAL TRADE COUNCIL, DEFENDANT-INTERVENOR

Consolidated Court No. 96–09–02209

[Final results of Commerce's redetermination sustained in part and remanded in part.]

(Decided March 16, 1999)

Arnold & Porter (Michael T. Shor) for Plaintiffs Asocolflores, the Flores del Rio Group, and the Florex Group.

Akin, Gump, Strauss, Hauer & Feld, L.L.P. (Patrick F. J. Macrory, Spencer S. Griffith, Lee Harriss Roberts, J. David Park) for Plaintiffs Eden Floral Farms, Equiflor, Espirit Miami, Floralex Ltda., the Agrodex Group, the Caicedo Group, and the Santana Group.

White & Case (Alan M. Dunn, Kristina Zissis) for Plaintiffs the HOSA Group.

David W. Ogden, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Lucius B. Lau*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; *Karen L. Bland, Jeffrey C. Lowe, Bernd G. Janzen, Sanjay J. Mullick*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., Amy S. Dwyer) for Defendant-Intervenor Floral Trade Council.

OPINION

POGUE, *Judge:* On March 25, 1998, this Court remanded certain aspects of the Department of Commerce's ("Commerce" or the "Department") final determination in *Certain Fresh Cut Flowers From Colombia*, 61 Fed. Reg. 42,833 (Dep't Commerce 1996) (final results antidumping duty admin. reviews) ("Final Results"). *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 CIT ____, 6 F. Supp.2d 865 (1998)(*"Asociacion Colombiana"*).[1]

The remand Order directed Commerce to reconsider the following aspects of the Final Results: (1) the methodology for the treatment of imputed credit expense; (2) the conclusion that U.S. selling expenses are a reasonable surrogate for selling expenses incurred on home market sales for purposes of calculating constructed value; and (3) the use of best information available ("BIA") for Santa Helena, a member of the Florex Group. The Court also instructed Commerce to correct its omission of a company-specific margin for Flor Colombia, S.A., for the seventh period of review. Plaintiffs Asocolflores, AFIF, and 81 individual Colombian producers of flowers, Florex[2], and Santa Helena[3] ("Plaintiff"), object to each aspect of Commerce's remand determination.

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[1] Familiarity with the Court's earlier decision in this case is presumed.

[2] Florex comprises Flores de Exportacion S.A., Agricola Guacari S.A., Flores Altamira S.A. and Four Farmers Inc.

[3] Santa Helena comprises Santa Helena S.A., Flores del Salitre Ltda. and S.B. Talee de Colombia Ltda.

DISCUSSION

1. IMPUTED CREDIT

In the underlying administrative review, Commerce made a circumstance of sale adjustment to foreign market value to account for imputed credit expenses incurred on U.S. sales. For those respondents that had actual U.S. loans during the period of review, Commerce calculated the U.S. credit expense using interest rates associated with those loans. *Final Results*, 61 Fed. Reg. at 42,848. For those respondents that did not have actual U.S. dollar-denominated loans, Commerce used a peso-based interest rate for the U.S. credit calculation. Commerce used the respondent's actual peso borrowing rate and adjusted that rate for the devaluation of the peso against the U.S. dollar. *Id.* at 42,849. This Court upheld as reasonable Commerce's determination that the Colombian producers' borrowing experience was an appropriate surrogate for the cost of extending credit to their U.S. customers. *Asociacion Colombiana*, 22 CIT at ____, 6 F. Supp.2d at 878. The Court, however, remanded the issue to the Department to "cite evidence to support the conclusion that its methodology—adjusting for the devaluation of the peso against the dollar—is well founded." *Id.* Specifically, the Court directed Commerce to explain "why it simply subtracted the devaluation rate from the peso-borrowing rate." *Id.*

Commerce states in the final results of redetermination ("Remand Determination"), that in order "to calculate the cost of financing the U.S. sale, we subtract the amount by which the Colombian peso was devalued vis-a-vis the U.S. dollar from the peso-denominated interest rate." Remand Determination at 4. Commerce explains its rationale noting, "[w]e are attempting to measure the opportunity cost of a sale, not the effective cost of a loan." *Id.* at 6. To illustrate, Commerce modifies an example provided by Plaintiff in its initial brief. *See* Initial Mem. of Pls. Asocolflores in Supp. Mot. J. Agency R. (April 21, 1997) at 22–23.

In the example, Commerce assumes that a company makes a sale of 10,000 U.S. dollars and that the exchange rate on the date of sale is 589.14 pesos per dollar. Remand Determination at 4. The customer pays the company one year later and the exchange rate on the date of payment is 725.17 pesos per U.S. dollar. *Id.* The company then borrows 10,000 pesos at an annual interest rate of 40%, with the principal and interest due one year later. *Id.*

In this example, had the customer paid on the date of sale, the company would have received 5,891,400 pesos and would not have accrued any interest expense. Because the customer actually paid a year later, the company accrues 2,356,560 pesos of interest (40% times 5,891,400). *Id.* at 4. Because the peso has been devalued against the U.S. dollar during that period of time, however, the company when it is paid actually receives 7,251,700 pesos (the date-of-payment exchange rate, 725.17, times the dollar amount of the sale, 10,000). *Id.* at 5. Thus, the company receives 1,360,300 pesos more than it would have received if the customer paid on the date of sale. *Id.* Therefore, the actual interest expense for

the sale is 996,260 pesos (the amount of interest owed at the conclusion of the loan, 2,356,560, minus the additional revenue received as a result of devaluation, 1,360,300). Significantly, Commerce determines the imputed interest amount by dividing the actual interest expense for the sale, 996,260, by the value of the sale at the time of the sale, 5,891,400 pesos, which is 16.91% of 5,891,400 pesos. *Id.* This percentage equals the annual interest rate (40%) minus the rate of devaluation (23.09%). *Id.*

Plaintiff challenges Commerce's methodology, arguing that Commerce's formula "in fact measures only the effective cost of the loan in peso terms; it did not measure the opportunity cost of the dollar sale." Pl.'s Comments Opposing Remand Determination ("Pl.'s Comments") at 19–20. Specifically, Plaintiff maintains that Commerce erroneously calculates the credit expense by using the exchange rate at the time of the sale.[4] *Id.* at 20. Plaintiff contends that the opportunity cost to the company, in dollar terms is the net credit expense measured at the exchange rate on the date the company paid the interest and repaid the loan.[5] *Id.* at 20. Plaintiff maintains that the Department's calculation overstates the opportunity cost to the company of financing the sale. The Court agrees.

Commerce's methodology appears to measure only the effective cost of the loan in peso terms[6], not the opportunity cost of the dollar sale. This is apparent by continuing with the Department's example. Commerce would calculate the imputed credit expense by applying the 16.91% to the sales value in dollars ($10,000), yielding a credit expense for the sale of $1,691. This approach, however, overstates the opportunity cost to the company. On the date of payment the company must pay a total of 8,247,960 pesos, or $11,374 (total peso amount that the company must pay back divided by the date-of-payment exchange rate). Thus, if the company sets aside $11,374 on the date of sale, it can make the payment.[7]

Commerce's conclusion that the cost is 16.91% of the sales value suggests that the company would have to set aside $11,691 (net credit expense divided by the original peso value of the sale) at the beginning of the year. If the company set aside this amount, however, it could pay the hypothetical loan at the end of the year, and still have $317 left over. Therefore, Commerce's example does not support its rationale—"[w]e

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[4] Here, Commerce points to its regulation concerning currency conversion, 19 C.F.R. § 353.60 (1995), asserting that when it makes fair market value comparisons, "we use the [constructed value] at the time of the U.S. sale and any necessary currency conversions must be linked to that date." Remand Determination at 6. This regulation, however, sets out the rule for converting a foreign currency to the equivalent amount of U.S. dollars. It has no bearing on the calculation of the proper imputed credit expense in calculating foreign market value.

[5] "[T]he opportunity cost of the delay in payment in dollar terms is equal to 13.74 percent of the original $10,000 value of the sale. The sale is worth 5,891,400 pesos ($10,000 x 589.14) on the date of sale. One year later, the company must repay the loan plus 40 percent interest (2,356,560 pesos), for a total of 8,247,960 pesos). This total peso payment is equal to $11,374 (8,247,960$725.17), and thus the opportunity cost of extending the credit in dollar terms is ($11,374–$10,000)/$10,000, or 13.74 percent." Pl.'s Comments at 19.

[6] As noted, Commerce divides the actual net credit expense (996,260) by the peso value of the original sale (5,891,400) to calculate a rate of 16.91%. Remand Determination at 5.

[7] "The imputation of credit cost is based on the principle of the time value of money." *LMI-LaMetalli Industriale, S.p.A. v. United States*, 8 Fed. Cir. (T) 157, 162, 912 F.2d 455, 460 (1990). Here, it costs the company an extra 13.74% of the sales value on the date of sale, to allow a buyer to delay a payment for a year.

are attempting to measure the opportunity cost of a sale"—for simply subtracting the devaluation rate from the peso-borrowing rate. Accordingly, the Court remands this issue to Commerce to apply a methodology that supports its rationale of calculating the opportunity cost of the sale.

2. U.S. Selling Expenses in Calculating Constructed Value

In the preliminary results of the underlying administrative review, Commerce used U.S. selling expenses incurred in Colombia (on export sales) for purposes of calculating a surrogate value for home-market selling expenses in calculating constructed value. *Final Results*, 61 Fed. Reg. at 42,843. In the Final Results Commerce used all U.S. selling expenses regardless of where the expenses were incurred as the surrogate for home-market selling expenses. *Id.* This Court upheld Commerce's decision to use the entire universe of U.S. selling expenses in its calculations.[8] *See Asociacion Colombiana*, 22 CIT at ___, 6 F. Supp.2d at 880. The Court, however, remanded this issue to the Department for reconsideration stating that "Commerce failed to cite evidence to support the conclusion that expenses incurred on sales in the United States would be a reasonable surrogate for selling expenses incurred for home-market sales." *Id.*

Upon remand, Commerce explains, "[t]he selling expenses incurred in the United States on U.S. sales are mainly commissions (to unrelated commissionaires), overhead expenses, such as refrigeration, sales office expenses, directors' salaries, communication expenses (i.e., telephone, facsimile), office supplies, and travel expenses similar to those which *likely would be* incurred on sales of flowers to any market." Remand Determination at 7 (emphasis added). Commerce concludes "*the record shows* that there are no unusual market-specific selling expenses incurred in selling to the United States that would not likely be incurred on sales in Colombia." *Id.* at 8 (emphasis added).

Commerce directs the attention of the Court to a single piece of evidence, Florex's description of its U.S. selling expenses. *Id.* at 7–8 (citing P.R. Doc. No. 42, Florex Group Section A Response (Nov. 29, 1993), App. A–2). This description, however, is not an examination of how Florex would make sales in Colombia.[9] Thus, it does not provide evidence to support Commerce's conclusion that there are no unusual market-specific selling expenses incurred in selling to the United States that would not likely be incurred on sales in Colombia.

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[8] Asocolflores argues at great length that Commerce had no legal basis to add selling expenses on U.S. sales to constructed value. Pl.'s Comments at 5–9. This Court, however, sustained Commerce's authority to use all U.S. selling expenses as the surrogate for home-market selling expenses. *See Asociacion Colombiana*, 22 CIT at ___, 6 F. Supp.2d at 880 (finding that Commerce's approach was reasonable because by including selling expenses associated with U.S. sales, Commerce ensured that its calculation of general expenses would remain unaffected by the shifting of expenses between the exporter and any related U.S. importer).

[9] The antidumping statute requires Commerce to include in its calculation of constructed value "an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers *in the country of exportation*, in the usual commercial quantities and in the ordinary course of trade * * *." 19 U.S.C. § 1677b(e)(1)(B)(1988)(emphasis added). In turn, Commerce's regulations, provide, in pertinent part, that constructed value shall include "[g]eneral expenses * * * usually reflected in sales of merchandise of the same class or kind as the merchandise by producers *in the home market country*. * * *" 19 C.F.R. § 353.50(a)(2)(1995)(emphasis added).

Plaintiff correctly points out that on remand Commerce simply provides a more detailed explanation of its previous decision. Commerce's determination continues to suffer from the flaw pointed out by the Court in *Asociacion Colombiana*, 22 CIT at ____, 6 F. Supp.2d at 880. There is no record evidence to support Commerce's conclusion that expenses incurred on sales in the United States are a reasonable surrogate for selling expenses incurred for home-market sales as required by the statute.

Commerce contends that because "the surrogate selling expenses are based on *actual* U.S. sales expenses reported by respondents * * * the Department's methodology is supported by substantial evidence." Remand Determination at 12 (emphasis added). The fact, however, that the sales expenses used are the actual U.S. sales expenses reported does not constitute evidence that they are representative of the expenses that would be incurred in a hypothetically viable Colombian market for export-quality flowers. Although Commerce correctly notes that a "surrogate is not intended to be an exact replica of what expenses in the home market would be," Remand Determination at 9, nevertheless, the substantial evidence standard requires more than what Commerce has provided.

The court will uphold a Commerce determination in an administrative review as long as it is in accordance with law and supported by substantial evidence on the record. *See* Section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended 19 U.S.C. § 1516a(b)(1)(B)(i)(1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)(quoted in *Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619–20 (1966).

Commerce also stated an additional reason why its use of U.S. selling expenses was appropriate:

> Finally, we note that there is no alternative to using U.S. selling expenses. As noted above, there are no home-market selling expenses because there is no viable home market. We have also determined that, for the same reasons that we cannot use third-country sales as a basis for foreign market value, it would be inappropriate to use third-country selling expenses. Thus, we find that, not only are U.S. selling expenses a reasonable surrogate for home market selling expenses, they are also the only available surrogate for home-market selling expenses. Therefore, because there is no more appropriate

> surrogate than U.S. selling expenses, we have continued to use U.S. selling expenses as a surrogate for home-market selling expenses.

Remand Determination at 10.

This court has recognized Commerce's authority to use information available to it when it was left with "no alternative." This line of reasoning, however, has been limited to the court's review of Commerce's actions in a "best information available" context. *See e.g.*, *Emerson Power Transmission Corp. v. United States*, 19 CIT 1154, 1159, 903 F. Supp. 48, 53 (1995)("the consequence of failing to provide adequate and timely information is to leave Commerce with no alternative but to proceed with its review relying upon the best information available); *Mitsubishi Heavy Indus., Ltd. v. United States*, 17 CIT 1024, 1031, 833 F. Supp. 919, 925 (1993)(noting that the "the consequences of failing to provide adequate and timely information is to leave Commerce with no alternative but to proceed with its review relying upon the best information available")(quoting *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 38, 628 F. Supp. 198, 206 (1986)); *NSK Ltd. v. United States*, 16 CIT 401, 406, 794 F. Supp. 1156, 1160 (1992)("Nevertheless, the fact remains that NSK did not produce the data, thus leaving Commerce with no alternative but to invoke the best information rule.").

The Court also recognizes that Commerce may, based on its experience in administering the statute, make justifiable inferences on the record before it. *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 50 (1954); *see also Matsushita Elec. Indus. v. United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984)(reviewing whether "the evidence and reasonable inferences from the record support the [ITC] finding."); *Borden Inc. v. United States*, 22 CIT ____, ____, slip op. 98–167, at 4 (Dec. 16, 1998)("Commerce must necessarily draw some inferences from a pattern of behavior."). The evidence relied upon by Commerce in this case, however, standing alone, does not provide a sufficient basis for the conclusions drawn by the Department.

Commerce's determination here amounts to nothing more than conclusory statements that expenses incurred on sales in the United States are a reasonable surrogate for selling expenses that would be incurred in a viable home market. *See* Remand Determination at 7 ("The selling expenses incurred in the United States on U.S. sales are * * * similar to those *which likely* would be incurred on sales of flowers to any market.")(emphasis added); *id.* at 8 ("there are no unusual market-specific selling expenses incurred in selling to the United States that *would not likely* be incurred on sales in Colombia"). Speculation, however, is not support for a finding. *See Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 15, 704 F. Supp. 1114, 1117 (1989), *aff'd*, 901 F.2d 1089 (Fed. Cir. 1990). "This type of conjecture is exactly the type of reasoning the substantial evidence standard aims to prevent, and is totally unsupported by substantial evidence." *China National Arts and Crafts Import and Export Corp. v. United States*, 15 CIT 417, 422, 771 F. Supp. 407, 412 (1991).

"[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). Therefore, the Court remands to afford Commerce the opportunity to provide further evidence showing that expenses incurred on sales in the United States are a reasonable surrogate for selling expenses incurred for home-market sales or to adopt a surrogate supported by substantial evidence on the record.

3. Choice of BIA for the Santa Helena Group

For the preliminary results of the underlying administrative review, Commerce applied a second-tier BIA rate[10] for the Santa Helena Group ("Santa Helena") due to its failure to correct its data or provide a narrative explanation in its reporting of amortized preproduction expenses pursuant to the crop adjustment methodology.[11] In the Final Results, Commerce collapsed the Santa Helena and the Florex Groups. Commerce combined the Santa Helena rate with the rates for the remaining members of the Florex Group.[12] This Court upheld Commerce's application of BIA as appropriate due to the deficiencies in Santa Helena's reported preproduction expenses. *See Asociacion Colombiana*, 22 CIT at ____, 6 F. Supp.2d at 892. The Court, however, remanded this issue to Commerce to reconsider whether Santa Helena's improper crop amortization rendered its entire response unreliable and to explain the findings supporting its decision. *Id.*

Upon remand, Commerce reconsidered its position and determined that applying a partial BIA to Santa Helena's crop adjustment reporting is appropriate. Remand Determination at 14. "We have decided this because Santa Helena responded adequately to the rest of our questionnaire and supplemental questionnaire and because there is an appropriate adjustment that can be made to Santa Helena's crop adjustment methodology which will obviate the need for total BIA." *Id.*

As partial BIA, Commerce chose to deny the claimed adjustment for carrying forward costs incurred in the current (monthly) period. That is, the Department chose to apply all of the reported costs in the current period to sales in the current period and included costs carried into the current period from prior periods. C.R. Doc. No 1 (Memo to File Fr: Richard Rimlinger, May 26, 1998) ("Redetermination Memo") at 2. Thus,

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[10] The application of BIA may be either "total" or "partial." Commerce applies total BIA when a party has failed to submit information in a timely manner, or when part of the submitted data is sufficiently flawed, rendering the entire response unreliable and unusable. *See Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 18 CIT 906, 915, 865 F. Supp. 857, 865 n.21 (1994), *aff'd*, 68 F.3d 487 (Fed. Cir. 1995); *National Steel Corp. v. United States*, 18 CIT 1126, 1131, 870 F. Supp. 1130, 1135 (1994). When Commerce resorts to total BIA, Commerce implements a "two-tier BIA methodology," which factors in a party's cooperation in the BIA determination. *Id.* Commerce uses partial BIA when only one part of the submitted information is deficient, but is still reliable in most other respects. *See Ad Hoc Comm.*, 18 CIT at 915, 865 F. Supp. at 865 n.21.

[11] Normally, Commerce requires respondents to report preproduction expenses consistent with their home country generally accepted accounting principles ("GAAP"), which typically are reflected in respondents' ordinary books and records. *See Final Results*, 61 Fed. Reg. at 42,857. In prior reviews Commerce accepted preproduction expenses that were amortized over a longer period than the period contained in respondents' books and records. Commerce terms this alternative approach to preproduction expenses the "Crop Adjustment Method." *Id.*

[12] Commerce applied the second-tier BIA rate for sales by Santa Helena during each period of review, weighting the BIA margins assigned to such sales with the calculated margins on sales by the other members of the Florex Group. *See* Remand Determination at 13–14.

Commerce disallowed any amortized amount to be carried forward.[13] In addition, Commerce made an adjustment to account for the effects of inflation.[14] Specifically, Commerce made an adjustment to lines 108 (preproduction materials costs paid in review period), 150 (preproduction labor costs paid in review period), 181 (depreciation), and 214 (other general and administrative expenses). *Id.* As a surrogate for increasing the asset value reported by Santa Helena, the Department used the percentage increase in these lines as reported by the Florex Group in response to the Department's July 1995 supplemental questionnaire requesting adjustments to certain costs for inflation. *Id.*

Plaintiff challenges Commerce's choice of BIA, arguing that the Department uses a highly punitive preproduction expense calculation.[15] Pl.'s Comments at 26. Plaintiff argues that Commerce has inappropriately mixed the two cost of production methodologies by combining Santa Helena's (monthly) preproduction expenses reported on a currently incurred basis and its reported preproduction expenses carried forward from prior periods calculated using an amortization methodology. *Id.* Plaintiff maintains that Commerce's approach results in the double counting of Santa Helena's preproduction expenses. *Id.* at 24.

Although Congress expressly mandated that Commerce use the best information available when faced with a party who is unwilling or unable to participate in the administrative review proceedings, it did not explicitly define what type of information constituted the "best" information.[16] Hence, because Congress has "explicitly left a gap for the agency to fill" in determining what constitutes the best information available, Commerce's construction of the statute must be accorded considerable deference. *Allied-Signal Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993)(citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

"The purpose behind permitting Commerce to resort to BIA is to induce respondents to provide Commerce with requested information in a timely, complete, and accurate manner so that the Department may de-

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[13] Consistent with Colombian GAAP, in calculating the cost of production for the subject flowers, there are two alternative methodologies for reporting preproduction expenses for calculating constructed value. Companies may report preproduction costs in the month such expenses are incurred, along with the production expenses incurred in tending plants actually in production that month. Alternatively, companies may capitalize all expenses associated with the preproduction phase, and amortize them in the months in which the plants are in production. Both of these methodologies have been approved by this court. *See e.g., Associacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 17–18, 704 F. Supp. 1114, 1119, *aff'd*, 901 F.2d 1089 (Fed. Cir. 1989); *Floral Trade Council of Davis v. United States*, 17 CIT 274, 275 (1993).

[14] As a result of Commerce's decision to resort to partial BIA for Santa Helena, Commerce made certain corrections to the group-wide rates for the Florex Group. Redetermination Memo at 2–3; Remand Determination at 20. No party challenges these changes.

[15] Plaintiff once again challenges Commerce's resort to BIA, arguing that Commerce should have relied upon Santa Helena's preproduction expenses reported in the (alternative) current basis method because there is no evidence that this reported data is incorrect. Pl.'s Comments at 28. Plaintiff asserts that because Commerce refers to its crop adjustment method as "optional" and "Commerce affords respondents the option of submitting preproduction expense data in one of two ways, and a respondent submits it both ways, Commerce has no basis for penalizing that respondent simply because one methodology was applied incorrectly." *Id.* at 30. This Court has already decided that Commerce's decision to resort to BIA was appropriate. *Asociacion Colombiana* 22 CIT at ___, 6 F. Supp.2d at 892. Accordingly, the Court will not revisit the issue here.

[16] The agency shall, "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. § 1677e(c)(1988).

termine current margins within statutory deadlines." *National Steel Corp. v. United States*, 18 CIT 1126, 1129, 870 F. Supp. 1130, 1134 (1994) (quoting *Rhone Poulenc Inc. v. United States*, 899 F.2d 1185, 1191 (1990)). "Although the ultimate purpose of BIA is not to punish, BIA is intended to be adverse," *see Pulton Chain Co. v. United States*, 17 CIT 1136, 1139 (1993). At the same time, Commerce's choice of BIA must be reasonable. "A rational relationship must exist between the 'data chosen and the matter to which they are to apply.'" *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992); *see also D & L Supply Co. v. United States*, 113 F.3d 1220 (Fed. Cir. 1997) (finding that it is "irrational" to uphold a rate when its foundation has been invalidated).

Here, Commerce utilized to the extent possible all current expenses reported by Santa Helena. Remand Determination at 14–17. Because there were errors in Santa Helena's amortizations[17], however, the Department also included costs carried into the current period from prior periods, explaining that it did so, "in order to ensure that we capture all of the costs attributable to the current period." *Id.* The Court finds that Commerce's approach was reasonable.

Because the deficiency in the record was Santa Helena's crop adjustment methodology, Commerce appropriately denied the claimed adjustment for carrying forward costs incurred in the current period to future periods. Commerce used record evidence to the extent possible, while ensuring that Santa Helena did not benefit from its failure to properly report costs. In resorting to partial BIA, Commerce appropriately utilized an adverse inference. *See National Steel Corp.*, 18 CIT at 1131, 870 F. Supp. at 1135 ("When errors in the information submitted constitutes a failure to provide the necessary data, Commerce applies a more adverse dumping margin as partial BIA."); *Ad Hoc Committee*, 18 CIT at 915, 865 F. Supp. at 867 n.22 (stating that in a "partial BIA" situation the only instance in which BIA is not adverse is when there is an inadvertent gap in the record, when only a minor or insignificant adjustment is involved, or when the missing data is beyond the control of the respondent). Further, Commerce's BIA choice represents a reasonable attempt to balance the "rational relationship" requirement, with the purpose of inducing respondents to cooperate with Commerce. *See supra* pp. 17–18.

Moreover, Commerce's approach is consistent with a major purpose of BIA to permit Commerce, and not respondents to control antidumping investigations. *See Allied-Signal*, 996 F.2d at 1191 (quoting *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990)("We agree that [Commerce] cannot be left merely to the largesse of the parties at their discretion to supply the [Department] with information. This is particularly the case when [Commerce] is attempting

[17] Santa Helena reported the "same values in all months for monthly preproduction expenses actually incurred as it did for monthly expenses carried forward to future periods." Florex Brief at 15. Santa Helena acknowledges that "its amortizations were reported incorrectly, and that the expenses carried forward in the beginning months of each review period should be less than the expenses actually incurred." *Id.*

to obtain information to conduct statutorily mandated administrative reviews because unlike [the International Trade Commission], the [Department] has no subpoena power.")). Indeed, to accept Plaintiff's arguments "would be tantamount to allowing a beneficial post-hoc correction of Santa Helena's response." Remand Determination at 17. Finally, Commerce's choice of partial BIA is not punitive because the agency did not reject low margin information in favor of high margin information that was demonstrably less probative of current conditions. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990).

Plaintiff also challenges Commerce's use of an inflation adjustment, arguing that the Department erred in adjusting Santa Helena's currently incurred preproduction expenses. Pl.'s Comments at 30. Plaintiff contends that the Department's practice is to only adjust assets for inflation. *Id.* at 31. Therefore, Commerce erred in adjusting Santa Helena's preproduction expenses.

Plaintiff is correct to the extent that Commerce does not make inflation adjustments to current expenses.[18] Thus, for those respondents that reported preproduction expenses on a current basis, no inflation adjustments were made to these expenses. *See e.g.*, C.R. Doc. No. 928 (Florcol Group Response to June 1995 Supplemental Questionnaire, July 18, 1995) at 2; C.R. Doc. No. 932 (Agricola Acevedo Ltda. Response to June 1995 Supplemental Questionnaire, July 19, 1995) at 2. However, this is not the case here. Plaintiff reported its preproduction expenses using the crop adjustment methodology.[19] Plaintiff also argues that if inflation adjustments are appropriate, the Department erred in its calculations of the inflationary factor. Pl.'s Comments at 32. First, Plaintiff maintains that Commerce's approach was not in accordance with law because it is "inconsistent with Commerce's BIA policy, applied to other respondents in these reviews and previously affirmed by this court, concerning how to make inflation adjustments for respondents that failed to report, or incorrectly reported, inflation adjustments." *Id.* Plaintiff contends that Commerce should have used the inflation adjustment factors that it calculated and applied to other non-responsive respondents as partial BIA.[20] *Id.* Plaintiff cites to *Cultivos Miramonte S.A. v. United*

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[18] Under Commerce's own inflation methodology, and consistent with Colombian GAAP, no inflation adjustment is made to current expenses because they are expressed in current value pesos. However, when a respondent uses the crop adjustment method, Commerce consistently makes inflation adjustments to amortized preproduction costs. *See infra* n.15.

[19] In its June 1995 supplemental questionnaire, Commerce directed respondents as follows:

> If you have amortized preproduction costs in tables 2A, 2B, or 2C and or depreciation expenses in Table 2D which are based on historical asset values which, revise these expenses so that they are based on asset values which, in accordance with Colombian GAAP, have been adjusted to reflect the effects of inflation and submit new diskettes.

June 22, 1995 Supplemental Questionnaire, P.R. Doc. No. 1508.

[20] In its memorandum dated February 20, 1996, Commerce's Office of Accounting examined the monthly inflation rates in Colombia during the relevant time periods and devised inflation adjustment factors to be used as partial BIA in cases in which respondents failed to correctly report inflation adjustments as instructed in the June 1995 supplemental questionnaire. P.R. Doc. No. 1721 (Memo to Richard Rimlinger from Michael Martin Re: Inflation Adjustments to Depreciation and Amortization Costs, Feb. 20, 1996) at 1. Separate factors were calculated for each period of review, for depreciation expense adjustments and preproduction amortization adjustments. *Id.* Commerce applied these inflation adjustment factors to the reported amortized preproduction expenses computed by respondents that failed to make inflation adjustments. *Final Results*, 61 Fed. Reg. 42,844–45.

States, 22 CIT ____, 7 F. Supp.2d 989 (1998), to support this position. Pl.'s Comments at 33.

Plaintiff claims that Commerce's use of a different BIA inflation adjustment for Santa Helena represents a departure from established agency practice regarding the determination of partial BIA for parties that failed to report, or incorrectly reported, inflation adjustments. *Id.* at 33. Therefore, Plaintiff contends that the Department is required to provide a "reasoned basis for departing from its use of the inflation factors it itself calculated for use as BIA." *Id.* This argument reflects a basic misunderstanding of the nature of Commerce's "BIA policy."

First, Commerce has broad discretion in determining what information to use once it establishes that the application of BIA is appropriate. *See Emerson Power Transmission Corp.* 19 CIT at 1159, 903 F. Supp. at 53. Indeed, Congress granted to Commerce the discretion to tailor its application of BIA to the unique facts of each proceeding. *Accord Allied-Signal*, 28 F.3d at 1191.

Second, Commerce's use of a particular BIA methodology for certain respondents during a period of review does not rise to the level of an agency practice or regulation having the force and effect of law but is rather a fact-specific determination in this case. *Cf. Motor Vehicle Mfrs. Ass'n of the United States*, 463 U.S. 29, 42–43 (1983) (finding that the agency's decision to revoke an existing regulation promulgated under the rule-making procedures of the Administrative Procedure Act, is void as arbitrary and capricious in the absence of a reasoned explanation for the revocation); *Cultivos Miramonte S.A. v. United States*, 21 CIT ____, ____, 980 F. Supp. 1268, 1274–76 (1997)(finding that when Commerce treated a respondent a particular way in two prior administrative reviews Commerce must explain the basis for its subsequent change in treatment); *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 795 F. Supp. 417 (1992)(holding that it was unreasonable for Commerce to alter a methodology used in the original less than fair value investigation and four annual administrative reviews, where the fact pattern remained unchanged and the error discovered in the methodology was of little significance).

Moreover, Plaintiff's reliance upon *Cultivos Miramonte* is misplaced. Plaintiff reads *Cultivos* too broadly. The limited issue before the Court in *Cultivos* was whether Commerce's partial BIA choice to apply four-month inflation adjustments to Cultivos Miramonte's production expenses was reasonable. 22 CIT at ____, 7 F. Supp.2d at 994. Commerce's specific treatment of Cultivos Miramonte, an unrelated respondent, has no bearing upon the case presently before this Court. *See Nation Ford Chem. Corp. v. United States*, 21 CIT ____, 985 F. Supp. 133 (1997)(stating that findings in past determinations, while often relevant, are not binding in subsequent cases), *aff'd*, Nos. 98–1253, 98–1254 (Fed. Cir. Feb. 2, 1999).

Third, Santa Helena is different than the other non-responsive respondents because Santa Helena failed to report correctly the underly-

ing data. The other respondents simply failed to report their inflation adjustments. Therefore, it was reasonable for Commerce to use a different BIA inflation adjustment for Santa Helena.

Plaintiff also argues that Commerce's actions are not in accordance with law because Commerce departed from using highly probative inflation factors (calculated using the actual Colombian inflation rates), to a demonstrably less probative calculation based upon meaningless ratios calculated for another company. Pl.'s Comments at 33.

Commerce adjusted information submitted by Santa Helena using actual inflation data reported in the instant investigation by the related sub-group Florex. Redetermination Memo at 2. Commerce's choice under the circumstances is not unreasonable.

That Commerce could have chosen information that would have resulted in a lower rate does not necessarily mean that the information selected was "less probative." The data reported by Santa Helena was not verified, so there is nothing on the record that would suggest that any of the information Commerce could have used was more or less probative of Santa Helena's actual inflation adjustments. Rather, what Plaintiff points to, are the different results of applying Commerce's inflation rates based on the formula it used for some respondents and the rates assigned to Santa Helena based on the Florex sub-group's data. Pl.'s Comments at 34. However, "[t]he best information 'is not necessarily accurate information, it is information which becomes useable because a respondent has failed to provide accurate information.'" *Krupp Stahl A.G. v. United States*, 17 CIT 450, 453, 822 F. Supp. 789, 792 (1993)(quoting *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT at 28, 704 F. Supp. 1114 at 1126).

Plaintiff also contends that the Department's approach is not supported by substantial evidence because the Florex sub-group made mistakes in reporting its inflation adjustments. Pl.'s Comments at 35. Specifically, Plaintiff argues that Florex did not follow Commerce's instructions in using the crop adjustment methodology in its original July 1994 questionnaire response.[21] Plaintiff maintains, therefore, Commerce erred in estimating the inflation effects experienced by Florex. *Id.* at 36.

Defendant counters "the record does not support Asocolflores' assertion that Florex calculated its inflationary adjustments based on [two crop adjustment fields]. Rather, Florex reported only the affected lines and the amount of the increase in each line. In addition, Florex did not disclose its methodology of calculating these amounts." Remand Determination at 19.

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[21] In *Asociacion Colombiana*, 22 CIT at ___, 6 Supp.2d 865 at 891, the Court rejected Plaintiff's argument that Commerce's instructions in its original questionnaire pertaining to the crop adjustment methodology "were unclear and inadequate." Here, Plaintiff contends the Florex sub-group correctly used the crop adjustment methodology because "Florex recognized that Commerce's instructions * * * were wrong, which affected the way in which it reported preproduction costs." Pl.'s Comments at 35 n.52. That is, Florex used only two of the three crop adjustment fields. *Id.* Florex reported expenses carried into the period from prior years and current expenses. C.R. Doc. No. 446 (Florex Section C & D Response, July 29, 1994) at 49–52. Florex did not, however, report expenses carried forward into the future. *Id.*

The Court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974). However, "the agency must examine the relevant data and articulate a satisfactory explanation for its action * * *." *Motor Vehicle Manuf. Ass'n. of U.S. v. State Farm Mutual Auto. Ins. Comp.*, 463 U.S. 29, 43 (1983). Here, as Commerce admits, the record does not disclose the specific methodology used to derive the inflation adjustments used as BIA. Thus, the Court cannot adequately review whether Commerce's determination is supported by substantial evidence. Accordingly, the Court remands this issue for reconsideration. Upon remand, Commerce must address Plaintiff's argument with respect to the accuracy of the inflation adjustments relied upon.

4. Company-Specific Margin for Flor Colombia

In the Final Results, Commerce failed to list a company-specific rate for Flor Colombia in its margin tables as prescribed by section 1675(a). *See* 19 U.S.C. § 1675(a)(1988). Because these tables are used to prepare the cash deposit instructions issued to the U.S. Department of Customs, a company-specific cash-deposit rate for Flor Colombia was omitted from Commerce's instructions to Customs. Thus, the Court remanded this issue to Commerce for reconsideration. *See Asociacion Colombiana*, 22 CIT at ____, 6 F. Supp.2d at 906.

Upon remand, Commerce explains "[w]hen a final and conclusive judgment is issued in these reviews, we will publish a notice of amended final results in the *Federal Register*. At that time we will issue cash deposit assessment instructions to Customs to collect cash deposits and duties for Flor Colombia at the appropriate rate (i.e., 62.79 percent)." Remand Determination at 19–20. No party challenges this correction. Therefore, Commerce's publication of a company-specific rate, in accordance with this Court's order in the underlying opinion, is affirmed.

Conclusion

In accordance with the foregoing, it is hereby **ORDERED** that Commerce's Final Results of Redetermination is remanded for Commerce to reconsider its treatment of imputed credit expenses in accord with the Court's opinion; and it is further **ORDERED** that the issue of U.S. selling expenses is remanded for further consideration in accord with the Court's opinion; and it is further ORDERED that the issue of Commerce's choice of inflation adjustments as BIA is remanded for further consideration in accord with the Court's opinion; and it is further **ORDERED** that remand results are due on **May 3, 1999**; comments and responses are due on **June 4, 1999**; any rebuttal comments are due on **June 18, 1999**.

(Slip Op. 99–25)

KOENIG & BAUER-ALBERT AG, ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND GOSS GRAPHICS, INC. DEFENDANT-INTERVENOR

Consolidated Court No. 96–10–02298

[Final results of Commerce's redetermination sustained in part and remanded in part.]

(Decided March 16, 1999)

Shearman & Sterling (Thomas B. Wilner, Jeffrey M. Winton, Michael J. Chapman, and Meredith Kolsky Lewis) for Plaintiffs MAN Roland Druckmaschinen AG and MAN Roland Inc.; *Kirkland & Ellis (Kenneth G. Weigel, Carol A. Rafferty, Nancy Kao)* for Plaintiffs Koenig & Bauer-Albert AG and KBA-Motter Corp.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Boguslawa B. Thoemmes*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, and *Randi Rimerman Serota*, Attorney, Department of Justice, Civil Division, Commercial Litigation Branch, for Defendants.

Wiley, Rein & Fielding (Charles Owen Verrill, Jr., Alan H. Price, Willis S. Martyn III, and *Leslie Johnson Pujo)* for Defendant-Intervenor.

OPINION

POGUE, *Judge:* On June 23, 1998, this Court remanded certain aspects of the Department of Commerce's ("Commerce") determination in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany*, 61 Fed. Reg. 38,166 (Dep't Commerce, July 23, 1996)(final determination)*("Germany Final"). See Koenig & Bauer-Albert AG v. United States*, 22 CIT ____, 15 F. Supp.2d 834 (1998).[1] Specifically, the Court directed Commerce: 1) to reconsider the decision not to combine MAN Roland's large newspaper printing press ("LNPP") production costs with those incurred by its subsidiary, MAN Plamag, and 2) to recalculate MAN Roland's selling, general, and administrative costs using an appropriate allocation ratio. *See id.* at ____, 15 F. Supp.2d at 858.

STANDARD OF REVIEW

The Court will uphold a Commerce determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

I. *Combining MAN Roland and MAN Plamag Production Costs*

A. Background

Where certain criteria are met, Commerce "collapses" related companies into one entity, deriving a single, weighted-average dumping margin for the collapsed entity as a whole. *See Asociacion Colombiana de*

[1] In that decision, Plaintiffs Koenig & Bauer-Albert AG ("KBA") and MAN Roland Druckmaschinen AG and MAN Roland Inc. ("MAN Roland"), respondents in the underlying investigation, and Plaintiff Goss Graphic Systems, Inc. ("Goss"), petitioner in the underlying investigation, filed separate motions challenging various aspects of Commerce's determination. The motions were consolidated.

Exportadores de Flores v. United States, 22 CIT ____, ____, 6 F. Supp.2d 865, 893 (1998). Here, during the underlying administrative proceedings, MAN Roland argued that, because MAN Roland and its wholly owned subsidiary, MAN Plamag, met the criteria for collapsing, Commerce "should [have] average[d] the labor and overhead rates of both the MAN Plamag and [MAN Roland] facilities because LNPPs [were] produced at both locations." *Germany Final* at 38,187.

In its final determination, Commerce neither outlined its collapsing practice nor explained why MAN Roland and MAN Plamag did not meet the requisite criteria. *See id.* at 38,188. Instead, without addressing the fact that both companies produced LNPPs, Commerce stated that "MAN Plamag is an affiliated party to [MAN Roland] * * * [that] supplies [MAN Roland] with one of the major production inputs[.]" *Id.* Commerce concluded, "[c]ontrary to [MAN Roland's] assertion, the Department's normal practice is not to automatically collapse affiliated suppliers and the respondent company." *Id.* In its brief, the government argued that it did not average MAN Roland's and MAN Plamag's costs because MAN Plamag was not a producer of identical merchandise. *See Koenig & Bauer-Albert*, 22 CIT at ____, 15 F. Supp.2d at 849, n. 7.

This Court found Commerce's response in its final determination to be insufficient. *See id.* at 849. Moreover, because Commerce's "identical merchandise" argument was a post hoc rationalization, the Court did not address it on the merits. *See id.* at 849, n.7. Therefore, the Court remanded the issue for Commerce to reconsider. *See id.* at 850. The Court also instructed Commerce that, if it chose to rely on the "identical merchandise" argument, it would have to reconcile its determination with *Certain Fresh Cut Flowers From Colombia*, 55 Fed. Reg. 20,491, 20,497 (Dep't Commerce, May 17, 1990)(final determination)*("Fresh Flowers")* and *Silicon Metal From Brazil*, 59 Fed. Reg. 42,806, 42,808 (Dep't Commerce, Aug. 19, 1994)(final determination)*("Silicon Metal")*.[2] *See id.* at 849, n.7.

In its redetermination, Commerce reconsidered the issue, but again decided not to combine the costs of MAN Roland and MAN Plamag for purposes of calculating the cost of production. *See* Final Results of Redetermination Pursuant to Remand (Dep't Commerce, Sept. 17, 1998)("Redetermination") at 3. Commerce maintained that, pursuant to its "established practice," it only averages a company's production costs from multiple facilities where the facilities actually produce *identical* merchandise. *Id.* (citing *Open-End Spun Rayon Shingles Yarn From Austria*, 62 Fed. Reg. 43,701, 43,703 (Dep't Commerce, Aug. 15, 1997)(final determination); *Canned Pineapple Fruit From Thailand*, 62 Fed. Reg. 42,487, 42,491 (Dep't Commerce, Aug. 7, 1997)(preliminary results of admin. review); *Antifriction Bearings (Other Than Tapered*

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[2] In *Certain Fresh Cut Flowers From Colombia*, Commerce averaged the costs of two related companies it collapsed even though it found that the flowers produced by the two farms were "somewhat different[.]" *Fresh Flowers* at 20,497. In *Silicon Metal From Brazil*, Commerce averaged a company's costs incurred at different furnaces in part because "other furnaces used to produce non-subject merchandise [could] be used to produce silicon metal." *Silicon Metal* at 42,808.

Roller Bearings) and Parts Thereof From France, 61 Fed. Reg. 66,472, 66,477 (Dep't Commerce, Dec. 17, 1996)(final results of admin. review)). In addition, Commerce argued that its decision in *Germany Final* was consistent with *Fresh Flowers* and *Silicon Metal*. *See id.* at 5,6.

Finally, Commerce addressed the policy argument advanced by MAN Roland as support for MAN Roland's position. In its comments to Commerce's redetermination, MAN Roland argued that Commerce's practice of averaging a respondent's production costs incurred at multiple facilities was designed "to avoid an opportunity for a respondent to escape dumping liability * * * simply because of the choice of the facility in which the merchandise was produced." Cmts. of MAN Roland on Redeterm. Pursuant to Remand ("MAN Roland Cmts.") at 7. In other words, according to MAN Roland, Commerce's practice is to average a respondent's production costs incurred at multiple facilities where the various facilities have the *capability* to produce the subject merchandise.

Countering MAN Roland's assertion, Commerce stated,

> We disagree with [MAN Roland's] argument that, where a respondent has the *ability* to produce the subject merchandise at more than one facility, the reported costs should reflect the weighted-average cost of manufacturing at all facilities. Contrary to [MAN Roland's] assertion, the Department does not weight-average the production costs incurred for non-identical merchandise simply because the respondent *could* have produced identical merchandise at one of its facilities.

Redetermination at 8.

B. Discussion

In its redetermination, Commerce maintained that it properly did not average MAN Roland's and MAN Plamag's production costs because, under its "established practice," Commerce only averages a company's production costs from multiple facilities where the facilities produce *identical* merchandise. *See* Redetermination at 3. The Court here reviews whether in fact Commerce's identical merchandise requirement constitutes its established practice in the context of affiliated parties.

The Court first concludes that Commerce has failed to explain how its identical merchandise practice is consistent with its decisions in *Fresh Flowers* and *Silicon Metal*.

In *Fresh Flowers*, Commerce weight-averaged the production costs of two related companies, Floramerica and Cultivos de Caribe, that were collapsed for purposes of calculating constructed value. *See Fresh Flowers* at 20,497. The Floramerica farm produced standard chrysanthemums, while the Cultivos de Caribe farm produced spider chrysanthemums. *See id.* In its redetermination, Commerce contended that it averaged the two farms' production costs because Commerce regarded the two chrysanthemum varieties "as part of the identical product category, chrysanthemums[.]" Redetermination at 5.

Commerce's position here is not consistent with the reasoning articulated in *Fresh Flowers*. There, Commerce explained, "[a]lthough the

flowers are somewhat different, we consider spider chrysanthemums and standard chrysanthemums to be the same type and therefore calculated one [constructed value] for both." *Fresh Flowers* at 20,497. The Court fails to see how the phrases "somewhat different" and "the same type" can be reconciled with "identical." Moreover, if, quoting Commerce, it is sufficient for the purpose of cost averaging that the products produced at each facility be "part of the identical product category," Commerce has not explained how different models of LNPPs are not members of an identical product category, LNPPs.

Similarly, Commerce failed to explain how its decision in *Germany Final* is consistent with *Silicon Metal*. In that determination, Commerce averaged a silicon metal producer's costs incurred by different furnaces. *See Silicon Metal* at 42,808. In its redetermination, Commerce asserted that *Silicon Metal* did not "support * * * [MAN Roland's] contention that the Department normally computes a weighted-average cost for merchandise that is non-identical * * * [because there the respondent] produced the identical merchandise in multiple furnaces during the period of review." Redetermination at 9.

While Commerce is correct that all the furnaces in question in *Silicon Metal* produced the subject merchandise during the period of review, *see Silicon Metal* at 42,808, Commerce's characterization of that determination ignores its stated rationale. In *Silicon Metal*, Commerce indicated that it averaged production costs incurred at multiple facilities to prevent the respondent from being *able* to avoid dumping liability through the manipulation of production:

The Department believes that it is inappropriate to

> specifically identify inputs obtained at a lower cost to a particular product or production run. The furnaces used to produce silicon metal can produce other products that are not subject to review. Likewise, other furnaces used to produce non-subject merchandise *can* be used to produce silicon metal. Accordingly, any benefits derived from the use of a particular furnace relate to all products produced during the period of review.

Id. (emphasis added). Therefore, contrary to Commerce's assertion, the decision in *Silicon Metal* did not require that the multiple facilities actually produce identical merchandise; rather, the decision was based on the *ability* to produce the subject merchandise at more than one facility.

Moreover, Commerce has failed to demonstrate that its identical merchandise requirement is its established practice in the context of affiliated parties. First, the determinations Commerce cited as support for its assertion were all made *after* its decision in *Germany Final*. *See* Redetermination at 3 (citing *Open-End Spun Rayon Singles Yarn From Austria*, 62 Fed. Reg. 43,701, 43,703 (Dep't Commerce, Aug. 15, 1997)(final determination); *Canned Pineapple Fruit From Thailand*, 62 Fed. Reg. 42,487, 42,491 (Dep't Commerce, Aug. 7, 1997)(preliminary results of admin. review); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France*, 61 Fed. Reg. 66,472, 66,497

(Dep't Commerce, Dec. 17, 1996)(final results of admin. review)). Therefore, Commerce cannot rely on these decisions as support for its assertion that its identical merchandise requirement was its established practice prior to its determination in *Germany Final*. Moreover, none of Commerce's cites specifically addresses the question at issue here: whether Commerce only averages the production costs incurred by affiliated parties at multiple facilities where the facilities produce identical merchandise during the period of review.[3]

Upon review of Commerce determinations, it is apparent that Commerce does have a multiple facility cost averaging practice where the respondent is a single entity. *See, e.g.*, *Steel Wire Rod From Venezuela*, 63 Fed. Reg. 8,948, 8,952 (Dep't Commerce, Feb. 23, 1998)(suspension of investigation)("Weighted-average costs are used for a product that is produced at more than one facility * * * based on the cost at each facility."); *Certain Cut-to-Length Carbon Plate From South Africa*, 62 Fed. Reg. 61,751, 61,754 (Dep't Commerce, Nov. 19, 1997)(suspension of investigation); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy*, 60 Fed. Reg. 10,959, 10,962 (Dep't Commerce, Feb. 28, 1995)(final results of admin. review). None of these determinations indicates, however, that the products manufactured at multiple facilities must be identical as a prerequisite to the weight-averaging of production costs.

Moreover, no authority discusses whether or not to average the production costs incurred by affiliated producers at multiple facilities. The only context in which such discussion does occur is in the context of collapsing. *See, e.g.*, *Fresh Flowers* at 20,497.

As noted in this Court's original decision, Commerce was not completely responsive to MAN Roland's underlying argument at the administrative level. *See Koenig & Bauer-Albert*, 22 CIT at ____, 15 F. Supp.2d at 849. There, MAN Roland argued that MAN Roland's and MAN Plamag's production costs should have been averaged because the two affiliated companies met Commerce's criteria for collapsing. *See Germany Final* at 38,187. Where Commerce collapses two affiliated companies, it

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[3] The issue in the *Austrian Yarn* case was whether, for purposes of the difference in U.S. and home market merchandise adjustment under 19 U.S.C. § 1677b(a)(6)(C)(ii), the respondent should report "a different cost of manufacturing for identical yarns due to the fact that different machines produce the yarn." *Open-End Spun Rayon Singles Yarn From Austria*, 62 Fed. Reg. 43,701, 43,703 (Dep't Commerce, Aug. 15, 1997)(final determination). Commerce decided to calculate a single weighted-average cost of manufacturing for the identical yarns because "the *difference in merchandise adjustment* is intended to account for physical differences in similar merchandise being compared and not differences in the production process[.]" *Id.* (emphasis added). The difference in merchandise adjustment is not relevant to the issue before the Court.

The *Thai Pineapple* decision Commerce cited was a preliminary determination that simply stated that Commerce "calculated a single weighted-average cost for products with identical physical characteristics[,]" without any indication of the context or the issue. *Canned Pineapple Fruit From Thailand*, 62 Fed. Reg. 42,487, 42,491 (Dep't Commerce, Aug. 7, 1997)(preliminary results of admin. review). Upon review of the matter's final determination, however, it is apparent that the issue addressed was not whether the costs at separate facilities should be averaged, but whether Commerce should calculate one average cost for the entire review period or separate costs for each fiscal year. *See Canned Pineapple Fruit From Thailand*, 63 Fed. Reg. 7,392, 7,399 (Dep't Commerce, Feb. 13, 1998)(final results of admin. review).

Finally, in *Antifriction Bearings*, Commerce decided that the respondent appropriately reported the production costs of a related party. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France*, 61 Fed. Reg. 66,472, 66,497 (Dep't Commerce, Dec. 17, 1996)(final results of admin. review). There was, however, no discussion of the degree of the parties' affiliation and no indication that the parties' merchandise needed to be identical. *See id.* Therefore, the determination does not help resolve the issue before this Court.

calculates a single weighted-average dumping margin for the companies as a whole. *See Asociacion*, 22 CIT at ____, 6 F. Supp.2d at 893. In *Germany Final*, Commerce described MAN Roland and MAN Plamag as affiliated parties, yet did not address whether the two companies should have been collapsed. *See Germany Final* at 38,188. Instead, Commerce merely stated that "the Department's normal practice is not to automatically collapse affiliated suppliers and the respondent company." *Id.*

This Court has previously held that Commerce has the authority to collapse multiple parties and treat them as a single entity. *See Queen's Flowers de Colombia v. United States*, 21 CIT ____, ____, 981 F. Supp. 617, 622 (1997).[4] Just prior to the issuance of *Germany Final*, Commerce outlined its criteria for collapsing as follows:

> In determining whether to collapse related or affiliated companies, the Department must decide whether the affiliated companies are sufficiently intertwined as to permit the possibility of price manipulation. In making this decision, the Department considers factors such as: (1) The level of common ownership; (2) interlocking boards of directors; (3) *the existence of production facilities for similar or identical products that would not require retooling either plant's facilities to implement a decision to restructure either company's manufacturing priorities*; and (4) whether the operations of the companies are intertwined as evidenced by coordination in pricing decisions, shared employees or transactions between the companies.

Certain Pasta From Italy, 61 Fed. Reg. 30,326, 30,351 (Dep't Commerce, June 14, 1996)(final determination)(emphasis added). *See also*, *Certain Hot-Rolled Carbon Steel Flat Products From Canada*, 58 Fed. Reg. 37,099, 37,107 (Dep't Commerce, July 9, 1993)(final determination); *Certain Granite Products From Spain*, 53 Fed. Reg. 24,335, 24,337 (Dep't Commerce, June 28, 1988)(final determination).

In particular, the Court notes the third criterion, which indicates that, in determining whether to collapse, Commerce considers the existence of production facilities for *similar or identical* products that afford the company the *ability* to manipulate its manufacturing priorities. Indeed, in the context of collapsing, this criterion contradicts Commerce's assertion that it will only average a respondent's production costs incurred at multiple facilities where the facilities produce identical products. *See* Redetermination at 3. Moreover, it undermines Commerce's assertion that "the Department does not weight-average the production costs incurred for non-identical merchandise simply because the respondent *could* have produced identical merchandise at one of its facilities." Redetermination at 8. To the contrary, whether a collapsed entity has the ability to evade the antidumping law through the manipulation of production is central to the question of whether to collapse the related

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[4] The Court's decision in *Queen's Flowers* addressed Commerce's practice under the antidumping law as it existed prior to the implementation of the Uruguay Round Agreements Act ("URAA"), which became effective on January 1, 1995. Commerce decided *Germany Final* under the current law as amended by the URAA. *See Germany Final* at 38,166. This court has recently upheld Commerce's collapsing practice as consistent with the URAA. *See AK Steel Corp. v. United States*, 22 CIT ____, ____, slip op. 98–159 at 22–23 (Dec. 22, 1998).

entities in the first place. *See Queen's Flowers*, 21 CIT at ____, 981 F. Supp. at 622 (holding that Commerce has statutory authority "to treat a related exporter and importer as a single entity in order to prevent price or production manipulation.").

In establishing regulations to conform with the URAA, Commerce codified its collapsing practice. *See Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,330 (Dep't Commerce, Feb. 27, 1996)(proposed rules). The new regulation states,

> (f) *Treatment of affiliated producers in antidumping proceedings*—(1) *In general.* In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity *where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.*
>
> (2) *Significant potential for manipulation.* In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:
>
> (i) The level of common ownership;
>
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
>
> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f)(1998)(emphasis added).

Although the collapsing regulation was not promulgated until May 19, 1997, it had already been proposed on February 27, 1996, and had been relied upon by Commerce as instructive and consistent with Commerce's practice and policy before its effective date. *See, e.g.*, *Gray Portland Cement and Clinker From Mexico*, 62 Fed. Reg. 47,626 (Dep't Commerce, Sept. 10, 1997)(preliminary results of admin. review)(stating that, although the proceeding was not governed by the new regulations, 19 C.F.R. § 351.401(f) was instructive because it described Commerce's current practice and policy); *Certain Pasta From Italy*, 61 Fed. Reg. 30,326, 30,352 (Dep't Commerce, June 14, 1996)(final determination)("While consistent with our practice on this issue, section 351.401(f) of the Department's proposed regulations give a new articulation to the collapsing test."). Therefore, Commerce was aware of the proposed regulation when it addressed MAN Roland's request to collapse on July 23, 1996.

In this context, the language of 19 C.F.R. § 351.401(f) contradicts the practice Commerce here asserts. Commerce claims that it will only average a respondent's production costs incurred at multiple facilities where the facilities produce *identical* products. *See* Redetermination at 8. The regulation, however, expressly states that Commerce will collapse (i.e., calculate a single weighted-average dumping margin for) two affiliated

producers where "those producers have production facilities for *similar or identical* products[.]" 19 C.F.R. § 351.401(f)(emphasis added); *see also Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,330 (Dep't Commerce, Feb. 27, 1996)(proposed rules)("[I]n rare situations the Department may conclude that a product that is not subject merchandise or a foreign like product is sufficiently similar to subject merchandise that the producers of those products may be candidates for collapsing.").

The regulation also undermines Commerce's assertion that "the Department does not weight-average the production costs incurred for non-identical merchandise simply because the respondent *could* have produced identical merchandise" at more than one facility. Redetermination at 8. Under the regulation, the presence of a "significant *potential* for the manipulation of price *or production*" is central to the decision of whether to collapse in the first place. 19 C.F.R. § 351.401(f)(emphasis added).[5]

The Court recognizes that "substantial deference [is] accorded to Commerce when interpreting and applying its own regulations[.]" *Torrington Co. v. United States*, 156 F.3d 1361, 1363 (Fed. Cir. 1998). Here, however, Commerce's application of the identical merchandise requirement is inconsistent with 19 C.F.R. § 351.401 and contrary to Commerce's collapsing practice.[6]

C. Conclusion

Commerce has not demonstrated that the identical merchandise requirement is its established practice in the context of affiliated parties. Moreover, the only context in which the discussion of whether to average the production costs of affiliated parties does occur is in the context of collapsing. Here, Commerce never addressed the threshold question of whether MAN Roland and MAN Plamag should be collapsed. Therefore, to properly determine whether MAN Roland's and MAN Plamag's production costs should be averaged, Commerce should apply its collapsing practice as it then existed and was later codified at 19 C.F.R. § 351.401(f). Commerce has not made the required finding. Therefore, the Court remands the matter for a determination consistent with this Court's opinion.

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[5] Commerce cited 19 C.F.R. § 351.401(f) in its redetermination, arguing that even where Commerce collapses two affiliated companies, it may properly decide not to weight-average the companies' production costs where the products manufactured by each are not identical. *See* Redetermination at 4–5. While it is certainly within Commerce's authority to make fact specific determinations, Commerce cannot do so in a way that is inconsistent with the regulation.

[6] Commerce argues that, even if the identical merchandise requirement is not its established practice, the Court should sustain it because the practice is reasonable, and Commerce gave the affected parties an opportunity to comment. *See* Def.'s Response to MAN Roland's Cmts. at 11 (citing *Usinor Sacilor v. United States*, 19 CIT 711, 742, 893 F. Supp. 1112, 1139 (1995), *appeal docketed*, No. 98–1269 (Fed. Cir. Feb. 13, 1998)). "Commerce has the flexibility to change its position providing that it explains the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence." *Cultivos Miramonte S.A. v. United States*, 21 CIT ___, ___, 980 F. Supp. 1268, 1274 (1997). Here, however, it is inconsistent for Commerce to argue that the identical merchandise requirement is both an established practice and a new practice. Moreover, the identical merchandise requirement is not consistent with Commerce's collapsing practice as it existed after, as well as before, the determination in *Germany Final*. *See, e.g., Stainless Steel Wire Rod From Sweden*, 63 Fed. Reg. 40,449, 40,453 (Dep't Commerce, July 29, 1998)(final determination); *Gray Portland Cement and Clinker From Mexico*, 62 Fed. Reg. 47,626, 47,626–627 (Dep't Commerce, Sept. 10, 1997)(preliminary results of admin. review). Thus, it is not apparent that Commerce changed its practice at the time of its determination in *Germany Final*.

II. *Recalculating MAN Roland's SG&A Expenses*

In the underlying decision, this Court remanded the matter to Commerce to recalculate MAN Roland's selling, general, and administrative ("SG&A") costs using an appropriate allocation ratio. *See Koenig & Bauer-Albert*, 22 CIT at ____, 15 F. Supp.2d at 855.

In calculating constructed value for MAN Roland's home market sales, Commerce rejected MAN Roland's submitted cost figures and relied instead on cost estimates prepared by MAN Roland prior to the initiation of the instant investigation. *See id.* at ____, 15 F. Supp.2d at 854. To isolate the SG&A costs attributable to each LNPP project, Commerce multiplied the total cost of production for each product by an SG&A ratio, which was equal to the total SG&A costs for all projects divided by the total cost of production for all projects. *See id.*

Inadvertently, however, Commerce used a somewhat inaccurate allocation ratio. *See id.* The denominator of the SG&A ratio did not include the cost of purchased parts worth more than DM 500 while the cost of production to which the ratio was applied included the cost of purchased parts worth more than DM 500. *See id.* Therefore, the resulting SG&A amounts were inflated. *See id.*

On remand, Commerce corrected the error by multiplying MAN Roland's SG&A ratio by the total estimated cost of manufacturing, exclusive of the value of purchased parts costing more than DM 500. *See* Redetermination at 10. Thus, the allocation ratio used on remand is reasonable because the SG&A ratio was determined on the same basis as the figures to which it was applied.

Commerce followed this Court's instructions in recalculating MAN Roland's SG&A expenses, and its methodology was reasonable. Moreover, MAN Roland concedes that the recalculation of SG&A was "reasonable[.]" MAN Roland Cmts. at 9.[7] Therefore, the Court sustains Commerce's recalculation of MAN Roland's SG&A expenses.

CONCLUSION

For the reasons set out above, Commerce's redetermination in Large Newspaper Printing Presses from Germany is remanded for reconsideration and explanation consistent with this Court's opinion. Commerce shall complete its remand determination by Monday, May 17, 1999; any comments or responses are due by Wednesday, June 16, 1999; and any rebuttal comments are due by Thursday, July 1, 1999.

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[7] MAN Roland argues, however, that, even though Commerce's SG&A calculation method on remand may be reasonable, "it certainly is not the only reasonable method, and it may not be the most accurate." MAN Roland Cmts. at 9. "'As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, [however,] and there is substantial evidence in the record supporting the agency's conclusions, the court will not * * * question the agency's methodology.'" *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 450, 773 F. Supp. 1549, 1553 (1991)(quoting *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–405, 636 F. Supp. 961, 966 (1986), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987)).

(Slip Op. 99–26)

ELKEM METALS CO., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 98–03–00475

[Defendant's Motion to Dismiss Granted]

(Decided March 23, 1999)

Baker and Botts, L.L.P (William D. Kramer, Kirk K. Van Tine, Clifford E. Stevens, Jr., Wendy L. Cox, Jacqueline H. Fine) for Elkem Metals Company, plaintiff.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau); Mark A. Barnett*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

MEMORANDUM OPINION AND ORDER

BARZILAY, *Judge:* Defendant, the United States, moves to dismiss Plaintiff's, Elkem Metals Company ("Elkem"), motion for judgment upon the agency record challenging the Department of Commerce's ("Commerce") continuation of a suspension agreement with the government of Ukraine, *Antidumping: Silicomanganese from Ukraine; Suspension of Investigation*, 59 Fed. Reg. 60,951 (Nov. 29, 1994). Defendant asserts that this Court does not possess subject matter jurisdiction. For the reasons that follow, this Court grants Defendant's motion to dismiss and denies Elkem's motion for judgment upon the agency record.

BACKGROUND

Plaintiff Elkem is a domestic producer of silicomanganese. On November 12, 1993, Elkem filed a petition with Commerce pursuant to 19 U.S.C. § 1673a. *Pl.'s Mot. J. Agency R.* at 1; *Def.'s Mot. Dismiss* at 1–2. Elkem alleged that imports of silicomanganese from Ukraine were being sold at less than fair value and that these imports were materially injuring, or threatening material injury, to a United States industry. *Id.* In response, on December 2, 1993, Commerce initiated an antidumping investigation on silicomanganese from Ukraine. *Initiation of Antidumping Duty Investigations: Silicomanganese From Brazil, the People's Republic of China, Ukraine and Venezuela*, 58 Fed. Reg. 64,553 (Dec. 8, 1993).

On June 17, 1994, Commerce published a preliminary determination which stated that imports of silicomanganese from Ukraine were being sold in the United States at less than fair value and assigned a dumping margin of 163 percent. *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Silicomanganese from Ukraine*, 59 Fed. Reg. 31,201 (June 17, 1994), as amended by *Correction of Ministerial Errors in Preliminary Antidumping Duty Determination: Silicomanganese from Ukraine*, 59 Fed. Reg. 37,969 (July 26, 1994).

Commerce then entered into a Suspension Agreement ("Agreement") with Ukraine pursuant to 19 U.S.C. § 1673c(l), which permits such

agreements with nonmarket economy countries as an alternative to the immediate issuance of an antidumping duty order. In this Agreement, the Government of Ukraine agreed to limit its exports of silicomanganese to the United States and ensure that those exports within the agreed quantitative limits were sold at or above a prescribed reference price. *Antidumping: Silicomanganese from Ukraine; Suspension of Investigation*, 59 Fed. Reg. 60,951 (Nov. 29, 1994).

On November 1, 1994, pursuant to 19 U.S.C. § 1673c(g), Elkem and Ukraine filed requests for continuation of the antidumping investigation. *Pl.'s Mot. J. Agency R.* at 2; *Def.'s Mot. Dismiss* at 2. On December 6, 1994, Commerce published its final determination, finding that imports of silicomanganese from Ukraine were being sold in the United States at less than fair value and assigning an antidumping margin of 163 percent. *Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese From Ukraine*, 59 Fed. Reg. 62,711 (Dec. 6, 1994).

On December 21, 1994, the United States International Trade Commission published its final affirmative injury determination. *Silicomanganese From Brazil, the People's Republic of China, Ukraine, and Venezuela*, 59 Fed. Reg. 65,788 (Dec. 21, 1994). No antidumping duty order was issued due to the continued existence of the Agreement and pursuant to 19 U.S.C. § 1673c(f)(3)(B). *Def.'s Mot. Dismiss* at 3.

In November of 1995, 1996, and 1997, Commerce published its "Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation" in which it gave interested parties an opportunity to request an administrative review of the Agreement. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 60 Fed. Reg. 55,540 (Nov. 1, 1995); 61 Fed. Reg. 56,663 (Nov. 4, 1996); 62 Fed. Reg. 60,219 (Nov. 7, 1997). No requests for review were made at any time by any party.

Elkem filed this action on March 4, 1998, invoking this Court's jurisdiction under 28 U.S.C. § 1581(i). Subsequently, on June 4, 1998, Commerce began a formal anticircumvention review pursuant to the terms of the Agreement. *Pl.'s Opp. Def.'s Mot. Dismiss* at 11–12. Commerce stated that the "review will be conducted to determine whether the commitments made under the reporting and anticircumvention provisions have been met." *Id.* at 12 (quoting Memorandum of Consultations Regarding Administration of the Silicomanganese Suspension Agreement, dated May 28, 1998). In addition, on November 12, 1998, Commerce published the fourth "Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation." *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 63 Fed. Reg. 63,287 (Nov. 12, 1998). As a result, Elkem requested an administrative review pursuant to 19 U.S.C. § 1675. Prior to this request, neither Elkem nor any other interested party had re-

quested an administrative review or a changed circumstances review pursuant to 19 U.S.C. § 1675.

ARGUMENTS

This action comes before the Court on Elkem's motion for judgment upon the agency record, pursuant to USCIT R. 56.1, and on Defendant's motion to dismiss, pursuant to USCIT R. 12(b)(1).

A. *Plaintiff's Argument*

Elkem argues that Commerce is compelled to cancel the Agreement and issue an antidumping duty order because Commerce has evidence that Ukraine has violated the Agreement. *Pl.'s Mot. J. Agency R.* at 6. Elkem asserts that Ukraine has violated the Agreement because the Ukrainian government failed to establish measures to ensure restriction of direct and indirect exports. *Id.* at 6–13. In addition, Elkem also asserts that as a result of Ukraine's violations, Commerce cannot effectively and adequately monitor compliance with the Agreement and cannot prevent the suppression or undercutting of price levels of domestic products. *Id.* at 14–15.

Elkem states that the Court has jurisdiction under subsection 1581(i) because the case is not reviewable under any other subsection of the statute. *Pl.'s Opp. Def.'s Mot. Dismiss* at 17. Elkem argues that no exhaustion of administrative remedies is required by the statute; furthermore, judicially mandated exhaustion is discretionary under 28 U.S.C. § 2637(d). *Id.* at 20. Elkem also argues that exhaustion would serve no purpose because there is nothing to be gained from permitting the compilation of a record or from agency expertise. *Id.* at 20–22. Elkem states that it has complained to Commerce many times, but to no avail. *Id.* at 25. An administrative review would not redress Elkem's injury because such a review would cover only a specific time period and would not reach violations that occurred outside that time. *Id.* at 26–27. Moreover, Elkem asserts, the reviews would take years and, since Commerce has been unwilling to consider Elkem's claims, as shown by their inaction for the past three years, Elkem could be put out of business. *Id.* at 28.

Elkem posits that Commerce is required by 19 U.S.C. § 1673c(i) to cancel a suspension agreement if the agreement has been violated. *Pl.'s Mot. J. Agency R.* at 22. Elkem asserts that since the statute states that "if the administering authority determines that an agreement * * * is being, or has been, violated, or no longer meets the requirements of [subsection 1673c(b) or (c)], it shall * * * issue an antidumping duty order," 19 U.S.C. § 1673c(i)(1)(C), then the use of the word *shall* is directive and offers Commerce no discretion whether to terminate the Agreement. *Id.* at 23. Elkem also suggests that legislative history supports the notion that Congress intended suspension provisions to be used rarely and only if compliance could be carefully monitored. *Id.* at 24.

Elkem furthers its argument by proffering Commerce's regulations under 19 C.F.R. § 351.209. *Id.* at 27. That regulation provides that if there is a finding of violation, which Elkem asserts in this case, then

there must be immediate action. *Id.* at 27–28. Elkem further asserts that Commerce has no discretion to offer an opportunity to cure to the party in violation. *Id.* at 27.

Elkem argues that it has petitioned Commerce for two and a half years to take action, and that such a delay by Commerce is unreasonable. *Pl.'s Opp. Mot. Dismiss* at 25. Elkem also asserts that Commerce never advised it that Elkem was pursuing the wrong course by informally contacting Commerce instead of requesting an administrative or changed circumstances review. *Id.* In its motion for judgment upon the agency record, Elkem requests that the Court compel Commerce to: 1) cancel the Agreement using immediate determination procedure; 2) suspend liquidation 3) issue an antidumping duty order; and 4) issue instructions to Customs for cash deposits.

B. *Defendant's Argument*

Commerce opposes Elkem's motion for judgment upon the agency record and argues that it has not acted in an arbitrary or capricious manner. *Def.'s Opp. Mot. J. Agency R.* at 21. Defendant has moved to dismiss arguing that this Court does not possess subject matter jurisdiction. *Def.'s Mot. Dismiss* at 6. Moreover, Commerce argues that this case does not meet the exacting standards necessary for the Court to mandamus an agency. *Def.'s Mot. J. Agency R.* at 16. Commerce posits that mandamus relief is an extraordinary measure and that the extraordinary circumstances under which it is granted do not exist in the case at bar. *Id.*

Commerce argues that the Court does not have jurisdiction under 28 U.S.C. § 1581(i) because judicial review would be available under a different subsection of the statute, and that such review would not be manifestly inadequate. *Def.'s Mot. Dismiss* at 6–7. Commerce states that since the Agreement's inception, during the month of each anniversary, Commerce has published a Notice to Request Administrative Review. *Id.* at 8–9. Commerce points out that neither Elkem nor any other party has ever filed such a request. *Id.* Similarly, no one took the opportunity to file for a changed circumstances review. *Id.*

Thus, Commerce posits that had Elkem pursued the appropriate administrative remedies, it could have sought an administrative or changed circumstances review. *Id.* at 8. Subsequently, Elkem could have sought judicial review of that determination under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c). *Id.* Commerce argues that its final determination in an administrative or changed circumstances review would provide the agency with an opportunity to make a record determination as to whether there is a basis to terminate the Agreement. *Id.*

Commerce argues that Congress, under 19 U.S.C. § 1673c(b), (c) and (l), has given the agency the power to terminate or suspend antidumping investigations by entering into suspension agreements with exporters to eliminate sales at less than fair value, or with exporters to eliminate injurious effect, or with a nonmarket economy to restrict value of imports. *Def.'s Opp. Mot. J. Agency R.* at 16–17. Commerce also asserts that Congress has left the task of monitoring compliance to

Commerce's discretion. *Id.* at 20. In this case, Commerce has entered into a suspension agreement with a nonmarket economy under 19 U.S.C. § 1673c(l). *Id.* at 20. Furthermore, Commerce asserts that it is monitoring the Agreement. *Id.* at 26.

Consequently, Commerce argues that Elkem does not have a right to demand termination of the Agreement because the only signatories were Commerce and Ukraine. *Id.* at 20. Commerce asserts the terms of the Agreement define what constitutes a violation, and that, thus far, Commerce has found no violations. *Id.* at 27. The Agreement also provides that, at the discretion of the Secretary, an act or omission which is inadvertent or inconsequential does not constitute a violation of the Agreement. *Id.* at 24–25.

Commerce states that there has been only one confirmed delivery of silicomanganese from Ukraine. *Id.* at 21. Commerce has not yet concluded that reporting inconsistencies rise to the level of a violation of the Agreement. *Id.* at 21–22. Commerce asserts that it has expressed strong concerns and has been in touch with the Ukrainian government regarding late filing and misfiling. *Id.* at 22. Moreover, Commerce has not identified specific evidence of suppression or undercutting of domestic prices. *Id.* Absent such evidence, Commerce's continuation of the Agreement is within its discretion and is not arbitrary or capricious. *Id.*

Commerce argues that other remedies are available to Elkem instead of mandamus. *Id.* at 27–28. Commerce asserts that Elkem may request a review of the Agreement under 19 U.S.C. § 1675(a)(1)(C), an administrative review pursuant to 19 U.S.C. § 1675(a)(1)(B), and under 19 U.S.C. § 1675(b)(1)(B), a change in circumstances review, and that judicial review of such determinations would be available to Elkem under 28 U.S.C. § 1581(c). *Id.*

DISCUSSION

Before the Court may consider Elkem's argument that Commerce is compelled to act as Elkem requests in its Complaint, the Court must establish whether appropriate subject matter jurisdiction exists. "It is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued * * *, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). In addition, the plaintiff has the burden of proving the requisite jurisdictional facts to establish the court's jurisdiction. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188–89 (1936); *see also Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995); *Hilsea Investment Ltd. v. Brown*, 18 CIT 1068 (1994); *Smith Corona Group, SCM Corp. v. United States*, 593 F. Supp. 415, 417 (CIT 1984).

The Court is unpersuaded by Elkem's argument that jurisdiction exists under 28 U.S.C. § 1581(i), also known as "residual jurisdiction." It is well established that the scope of residual jurisdiction of this Court is very narrow and that it "may not be invoked when jurisdiction under

another subsection of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate." *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied* 484 U.S. 1041 (1988); *accord Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992); *accord National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1556–59 (Fed. Cir. 1988); *see also Industria de Fundicao Tupy v. Brown*, 866 F. Supp. 565, 571 (CIT 1994).

Pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iv), a determination by Commerce, "under section 1671c or 1673c of this title, to suspend an antidumping duty * * * investigation," is reviewable by this Court. An interested party may request Commerce to "review the current status of, and compliance with, any agreement by which an investigation was suspended." 19 U.S.C. § 1675(a)(1)(C).

Elkem, as a domestic producer of silicomanganese, qualifies as such an interested party, and jurisdiction vests in this Court to review the challenged determination pursuant to 28 U.S.C. § 1581(c), as provided for in 19 U.S.C. § 1516a. Subsection 1581(c) provides that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." Since § 1581(c) provides explicitly for the type of review sought by Elkem, its claim for jurisdiction under § 1581(i) cannot be sustained.

The Court is persuaded by this Court's reasoning in *Ad Hoc Committee of Fl. Producers of Gray Portland Cement v. United States*, 1998 Ct. Intl. Trade LEXIS 137 *("Ad Hoc II")*, where this Court was required to review two quarterly fair market value calculations made pursuant to a suspension agreement entered into to suspend an antidumping investigation of gray portland cement and cement clinker from Venezuela. *Id.* at ____. In 1991, Commerce initiated an antidumping investigation in response to plaintiff's petition. After publishing its affirmative preliminary determination, Commerce entered into the suspension agreement, whereby it agreed to calculate fair market value based upon the constructed value of the merchandise, as provided by the importers. *Id.* at ____. Throughout the administrative process, plaintiff objected to numerous aspects of the fair market value and constructed value calculations. In 1993, plaintiff commenced an action under § 1581(i) to "contest Commerce's action during the course of the suspension agreement proceedings." *Id.* at ____. Subsequently, Commerce filed a motion to dismiss for lack of subject matter jurisdiction. This Court denied that motion in *Ad Hoc Committee of Fl. Producers of Gray Portland Cement v. United States*, 866 F. Supp. 576 (1994) *("Ad Hoc I")*, holding that the court could consider the case under its residual jurisdiction authority. *Id.* at 581. The case was then reassigned.

In *Ad Hoc II*, this Court reasoned that plaintiff could have invoked this Court's jurisdiction under another subsection of § 1581 and that the remedy would not have been inadequate. The Court explained that:

> Congress expressly mandated a procedure for the review of suspension agreement proceedings. The antidumping statute requires Commerce to initiate an administrative review of a suspension agreement upon the request of an interested party. *See* 19 U.S.C. § 1675(a). Specifically, 19 U.S.C. § 1675(a)(1)(C) provides that Commerce shall 'review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any subsidy or margin of sales at less than fair value involved in the agreement.' In turn, a party may seek judicial review of such determination pursuant to 28 U.S.C. § 1581(c), as provided in 19 U.S.C. § 1516a(a)(2)(B)(iii) (permitting judicial review of determinations made under 19 U.S.C. § 1675). Accordingly, it could not be more plain that Congress mandated a scheme for the review of suspension agreements. And, in this scheme, this court's jurisdiction to review suspension agreements flows from subsection 1581(c). And importantly, when it defined the scope of this court's jurisdiction as part of the Customs Court Act of 1980, the House Judiciary Committee explicitly stated that 'it is the intent of the Committee that the Court of International Trade not permit [28 U.S.C. § 1581(i)] * * * to be utilized to circumvent the exclusive method of judicial review of those antidumping * * * determinations listed in [19 U.S.C. § 1516a],' which includes administrative review determinations of suspension agreements. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 48 (1979), reprinted in 1980 U.S.C.C.A.N. 3729, 3759–60. Thus, because in this Court's view subsection 1581(c) serves as the jurisdictional basis for review of suspension agreement proceedings, the invocation of subsection 1581(i) jurisdiction is only appropriate if the relief available under subsection 1581(c) is manifestly inadequate.

Ad Hoc II at ____.

Although the court *Ad Hoc II* went on to review the case under residual jurisdiction, it did so for very specific reasons. First, the Court was following a previous decision in the same case. That is not the case here, as this is the first time this case is being reviewed by a court.

Moreover, in *Ad Hoc II*, this Court was mindful of the lengthy interval, of approximately seven years, between the start of that case and the decision. Although six years have transpired between today's decision and the start of this case, the Court notes that Elkem itself was responsible for the timing of judicial review. Elkem was afforded three opportunities to request an administrative review, and took that opportunity only upon publication of the fourth notice to request an administrative review. Thus, had Elkem wanted to significantly shorten the time between the start of its case and today, it certainly had the opportunity. Also, although the Court is sympathetic to Elkem's business concerns, such concerns do not persuade the Court to ignore clearly applicable standards set by Congress. *See Miller & Co. v. United States*, 824 F.2d

961, 964 (Fed. Cir. 1987), *cert. denied* 484 U.S. 1041 (1988) ("mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate."). Thus, it is clear to the Court that Congress provided a specific, and clearly adequate, method to challenge determinations. Such a method should not be circumvented through the use of residual jurisdiction.

For the reasons discussed above, the Court finds that Elkem has not satisfied its burden of demonstrating that subject matter jurisdiction exists. Thus, the Court holds that Elkem could have invoked this Court's jurisdiction under another subsection of 28 U.S.C. § 1581, and that the relief provided therein would not have been manifestly inadequate.

Accordingly, it is hereby

ORDERED that Defendant's Motion to Dismiss is Granted and that Plaintiff's Motion for Judgment Upon Agency Record is Denied.

(Slip Op. 99–27)

FERRO UNION, INC. AND ASOMA CORP., PLAINTIFFS *v.* DEFENDANT, AND WHEATLAND TUBE CO., DEFENDANT-INTERVENOR

Court No. 97–11–01973

[Antidumping determination remanded.]

(Dated March 23, 1999)

Mayer, Brown & Platt (Simeon M. Kriesberg, Carol J. Bilzi, Peter C. Choharis, Monica B. Goldberg, Andrew A. Nicely) for plaintiffs.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer, Michele D. Lynch), Karen Bland*, International Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Schagrin Associates (Roger B. Schagrin, R. Alan Luberda, John C. Steinberger) for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Ferro Union, Inc. and Asoma Corporation (collectively "Ferro Union" or "Plaintiffs") challenge the determination of the United States International Trade Administration ("Commerce" or the "Department") in *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 62 Fed. Reg. 53,808 (Dep't Commerce 1997) (final results of antidumping admin. rev.) [hereinafter *"Final Results"*].

Ferro Union raises two grounds for reversal or remand of the Final Results. The facts relating to each count will be stated separately.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c)(1994). In reviewing final determinations in antidumping duty investigations, the court will hold unlawful those agency determinations which are unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1994).

I. *Termination of the Antidumping Review*

BACKGROUND

Commerce issued an antidumping duty order on welded carbon steel pipes and tubes from Thailand in 1986. *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 51 Fed. Reg. 8,341 (Dep't Commerce 1986). On March 4, 1996, Commerce published a notice of opportunity to request an administrative review of the 1986 order for the period March 1, 1995 to February 29, 1996. *Notice of Opportunity to Request Administrative Review*, 61 Fed. Reg. 8,238 (Dep't Commerce 1996). In this notice, Commerce stated that requests for review were to be made "[n]ot later than March 31, 1996." *Id.*

Saha Thai Steel Pipe Co., Ltd. ("Saha Thai"), and S.A.F. Pipe Export Co., Ltd. ("SAF"), Saha Thai's affiliated exporter, along with Ferro Union and Asoma Corp., Saha Thai's U.S. importers, filed a request for review on April 1, 1996.[1] *Request for Review* (Apr. 1, 1996), Pl.'s App., 15A–15B. Thai Union Steel Co., Ltd. ("Thai Union"), another Thai producer, also timely requested a review. *Final Results*, 62 Fed. Reg. at 53,809. Thai Union is not a party to this action. Commerce announced its initiation of the review on April 25, 1996. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 61 Fed. Reg. 18,378, 18,378–79 (Dep't Commerce 1996). On May 9, Commerce issued the preliminary results for a preceding administrative review of the same merchandise, and assigned Saha Thai an antidumping margin of 1.07 percent. *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 61 Fed. Reg. 21,159, 21,161 (Dep't Commerce 1996) (prelim. results of admin. rev.).[2] Plaintiffs claim that this low margin prompted Saha Thai's May 14, 1996 request that Commerce terminate the review with respect to sales by Saha Thai. *Request for Termination* (May 14, 1996), Pl.'s App., 16A–16B.

The domestic interested parties, Allied Tube and Conduit Corporation, Laclede Steel Company, Sawhill Tubular Division of Armco, Inc., and Wheatland Tube Company,[3] (collectively the "Domestic Interested Parties"), objected to a termination of the administrative review on the basis that they had made a timely request for review on March 29, 1996. *Schagrin Associates' Comments on Request to Terminate Review* (June 21, 1996), P.R. 8, DIP's App., p. 23. In late May, counsel for the Domestic Interested Parties spoke with Commerce supervisor, Jean Kemp, and

[1] This request was timely pursuant to 19 C.F.R. § 353.31(d)(1995), which provides that when a deadline falls on a non-business day, Commerce will accept documents filed on the next business day.

[2] This administrative review covered the period March 1, 1994 to February 28, 1995. 61 Fed. Reg. at 21,159.

[3] Wheatland Tube Company ("Wheatland") is a Defendant-Intervenor in this action.

learned that Commerce had no record of a request for review by the Domestic Interested Parties in its Central Records Unit, Room B–099.[4] *Id.* at 2. Nevertheless, the Domestic Interested Parties were able to produce evidence of their March 29 request.[5]

Commerce found that "the evidence on the record does not provide a definitive answer" regarding whether there was any "official record of petitioners' request." *Commerce Memorandum to Robert S. LaRussa from Stephen J. Powell* (July 11, 1996), P.R. 14, DIP's App., p. 44. Commerce concluded that "because the reason for the filing error is unclear and given the remedial nature of the antidumping law and the fact that Saha Thai received notice of the [Domestic Interested Parties'] request," it could elect to continue the ongoing administrative review. *Final Results*, 62 Fed. Reg. at 53,809.

Ferro Union claims that Commerce violated its regulations by denying Saha Thai's request for termination and continuing the review.

Discussion

Ferro Union asserts that Commerce was obliged to terminate the review on the grounds of Commerce's own regulations and the agency's established practice under those regulations. Ferro Union also argues that the evidence of the Domestic Interested Parties' request was not a sufficient independent ground for Commerce to conduct the review.

Under the antidumping statute, 19 U.S.C. § 1675(a)(1)(1994), Commerce must conduct an administrative review of an anti-dumping duty order if a party requests such a review.[6] This method of commencing reviews replaced the former requirement that Commerce conduct reviews on an annual basis, regardless of requests for review by foreign producers, importers, or domestic interested parties. *See* Trade Agreements Act of 1979, Pub. L. No. 96–39, Title I, § 101, 93 Stat. 175 (1979) (amending Tariff Act of 1930) (Sec. 751 administrative review of determinations). When Congress eliminated the obligatory annual reviews, the conference agreement stated that this change was "designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority." H.R. Rep. No. 98–1156, 98th Cong., 2d Sess. at 181 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5298. The statute

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[4] Commerce considers documents "received" when they are "stamped by the Central Records Unit with the date and time of receipt." 19 C.F.R. § 353.31(d)(1995). No such date-stamped copy of the Domestic Interested Parties' request has been found.

[5] The Domestic Interested Parties submitted an affidavit from Jeffrey Combs, a messenger from Quick Messenger Service of Washington, D.C., stating that he remembered delivering a package from Schagrin Associates to the Central Records Unit at the Department of Commerce on March 29, 1996. Mr. Combs' log for the day was also attached, showing that a package was delivered to Room B–099 to a person named "Josey." *Schagrin Associates' Comments on Request to Terminate Review* (June 21, 1996), P.R. 8, DIP's App., 23 at ex. 2. Counsel for the Domestic Interested Parties also submitted an affidavit stating that he had addressed an original and seven copies of the request to the Central Records Unit, along with a copy to Ms. Pamela Woods in Room 3065. *Id.* at ex. 3. Ms. Woods indicated that she had received the courtesy copy of the request. *Id.* at 4. The Domestic Interested Parties also served their request on counsel for Ferro Union and Saha Thai.

[6] Section 1675(a)(1) of Title 19 provides: "At least once during each 12-month period beginning on the anniversary of the date of publication of * * * an antidumping duty order under this subtitle * * * the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—(B) review, and determine * * * the amount of any antidumping duty * * * and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed."

does not make any provisions for the termination of administrative reviews.

Commerce did not establish a method of withdrawing a request for review until it issued its final rules in March 1989, which implemented the 1984 amendments.

> The Secretary may permit a party that requests a review * * * to withdraw the request not later than 90 days after the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so. When a request for review is withdrawn, the Secretary will publish in the Federal Register notice of [the termination of the review.]

Antidumping Duties: Final Rule, 54 Fed. Reg. 12,742, 12,778 (Dep't Commerce 1989) [hereinafter *"1989 Regulations"*] (codified at 19 C.F.R. § 353.22(a)(5)(1995)).[7]

The commentary to 19 C.F.R. § 353.22(a)(5) addresses situations where one party has submitted a request for review, but it does not indicate how Commerce would respond to situations where multiple parties make a request for review and then disagree over whether to terminate the review. *See 1989 Regulations*, 54 Fed. Reg. at 12,755. In its final regulations issued to comply with the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994), Commerce amended 19 C.F.R. § 353.22(a)(5). The new provision provides:

> *Withdrawal of request for review.* The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

Antidumping and Countervailing Duties: Final Rule, 62 Fed. Reg. 27,296, 27,393 (Dep't Commerce 1997) (codified at 19 C.F.R. § 351.213(d)(1) (1998)) (hereinafter *1998 Regulations*).[8]

Ferro Union claims that the 1989 Regulations, 19 C.F.R. § 353.22(a)(5), mandated termination of antidumping reviews if the termination request was made within 90 days. Ferro Union bases this argument on that fact that the last sentence of the regulation says that the Secretary "will" publish notice of termination if the request is "withdrawn," and that it is the party, and not Commerce, which withdraws the request.

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[7] Prior to the promulgation of 19 C.F.R. § 353.22, this court found that Commerce had "reasonably interpreted the statute [19 U.S.C. § 1675(a)(1)] as allowing it discretion to deal with this issue [of withdrawing requests for administrative reviews]." *Sugiyama Chain Co., Ltd. v. United States*, 18 CIT 423, 430, 852 F. Supp. 1103, 1110 (1994).

[8] These final regulations were issued after the commencement of the review of Saha Thai, therefore the earlier rule as found at 19 C.F.R. § 353.22(a)(5) (1995) is the relevant regulation. Commerce stated, however, that the 1998 Regulations contained in part 351 "serve as a restatement of the Department's interpretation of the requirements of the [Tariff] Act as amended by the URAA" for administrative reviews "initiated on the basis of * * * requests made after January 1, 1995, but before part 351 applies." *1998 Regulations*, 62 Fed. Reg. at 27,417. The court will therefore consider Commerce's discretion to deny a request for termination under both 19 C.F.R. § 353.22(a)(5)(1995) and 19 C.F.R. § 351.213(d)(1)(1998).

The plain language of 19 C.F.R. § 353.22(a)(5) states that the Secretary "may" permit a party who requested a review to withdraw that review. Therefore, on its face, 19 C.F.R. § 353.22(a)(5) did not mandate that Commerce terminate these reviews. Although the 1998 final regulations, 19 C.F.R. § 351.213(d)(1) (1998), state that the Secretary "will rescind" an administrative review that is withdrawn, whether the withdrawal will be recognized is discretionary. Furthermore, the legislative history of 19 U.S.C. § 1675(a) indicates that Congress intended to limit reviews in which no one had an interest, and Commerce could rightly continue a review in which there is an expressed interest.

While 19 C.F.R. § 351.213(d)(1) (1998) is written in more mandatory language, neither 19 C.F.R. § 353.22(a)(5)(1995) nor 19 C.F.R. § 353.213(d)(1) (1998) address the question of terminating reviews when more than one party makes an initial request for the administrative review. When faced with such a situation, Commerce could reasonably conclude that it has discretion as to whether or not to terminate the review.[9]

Plaintiffs also allege that Commerce has established an unswerving practice of granting requests for termination of administrative reviews, and that this consistent practice required that Commerce terminate its review of Saha Thai.[10] Plaintiffs have attached a list of over 180 cases where Commerce granted termination requests.[11] Plaintiffs are correct that Commerce has granted numerous requests for termination. Plaintiffs claim that these include instances where multiple parties requested the initiation of the administrative review. In situations involving multiple parties, however, Commerce has only granted termination when no other party objected to the termination.[12] Indeed, one case cited by Plaintiffs shows that Commerce does not terminate reviews when another party objects. In *Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong*, 58 Fed. Reg. 63,917 (Dep't Commerce 1993) (prelim. results of and termination in part of admin. rev.), Commerce terminated the review of two companies, but declined to termi-

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[9] Ferro Union cites numerous cases stating that agencies are required to abide by their own regulations. *See Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988) ("government officials must follow their own regulations"); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("elementary that an agency must adhere to its own rules and regulations.") This rule, however, is only applicable if one assumes that Commerce's regulations did mandate a termination of the review upon request. As indicated, the regulations do not fully address the situation at hand.

[10] Plaintiffs rely on *M.M.&P. Maritime Advancement, Training, Education & Safety Program v. Department of Commerce*, 729 F.2d 748 (Fed. Cir. 1984) for the rule that Commerce is obliged to follow its own precedent and "if it chooses to change, it must explain why." *M.M.&P.*, 729 F.2d at 755. In that case, the Federal Circuit found that Commerce had not violated this principle of administrative law, because Commerce had not "consistently required that [an] article must be used in formal-science oriented education" in order to qualify for duty-free entry under the Educational, Scientific, and Cultural Materials Importation Act of 1996. *Id.* Likewise, the court does not find that Commerce has established a consistent practice of granting a request for termination of an administrative review when more than one party has expressed an interest in the review, and there is evidence of a timely request by the non-withdrawing party.

[11] *Attachments to Memorandum of Points and Authorities in Support of Plaintiff's Motion for Judgment on the Agency Record* (May 1, 1998), Pl. Br., Att. 1.

[12] In *Antifriction Bearings (Other Than Tapered Roller Bearings)*, 59 Fed. Reg. 9,463 (Dep't Commerce 1994) (prelim. results and partial termination of admin. rev.), the antidumping review results involved 38 manufacturers/exporters. Commerce terminated the reviews of nine other manufacturers/exporters because the requests were withdrawn in a timely manner by six companies and "there were no other requests for review of these companies from any other interested parties." *Id.* at 9,465. Likewise, in *Certain Fresh Cut Flowers from Colombia*, 56 Fed. Reg. 32,169 (Dep't Commerce 1991) (final results of admin. rev.), the review covered numerous producers of subject merchandise, but reviews of 18 producers and/or exporters were terminated "because these companies withdrew their requests for a review on a timely basis and the petitioner did not request reviews of them." *Id.* at 32,170.

nate the review of a third, Everest Knitwear, because "petitioners had requested Everest be reviewed." *Id.* at 63,917.

In *Potassium Permanganate from the People's Republic of China*, 59 Fed. Reg. 46,035 (Dep't Commerce 1994) (termination of admin. rev.), Commerce granted a termination request although a respondent objected to this termination. In this case, respondent Zunyi Chemical Factory did not make its own request for review. Commerce concluded that "Zunyi could have * * * guaranteed its right to continue this review, by making its own request for review at the proper time." *Id.* at 46,035.[13] This case reveals Commerce's preference that interested parties file individual requests for review, rather than rely on another party's request. The Domestic Interested Parties tried to do just that. Commerce could reasonably distinguish the Domestic Interested Parties from Zunyi, because they did try to "preserve their right to compel the review" by filing their own request. Commerce's conclusion that it was not clear who was responsible for the filing error does not lead to a conclusion that the Domestic Interested Parties are in the same position as Zunyi. Unlike the Domestic Interested Parties, Zunyi never attempted to file its own request for review.

Moreover, Commerce retains some flexibility to relax its procedural rules. *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) ("[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.") (quoting *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953)).[14] Plaintiffs argue that Commerce could not have legitimately conducted the review based on the request by the Domestic Interested Parties, on the grounds that 19 U.S.C. § 1675(a) is a jurisdictional provision, which only allows Commerce to conduct administrative reviews if a request is "received" according to the regulatory definition of "received."[15] The court disagrees. The statute does provide that Commerce will conduct the administrative review upon receipt of a request for review. *See* 19 U.S.C. § 1675(a). The regulatory definition of "receipt" in effect at the time did not prevent Commerce from exercising its discretion to conclude that a party has made a request, even in the absence of a date-stamped copy of the request. The

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[13] Commerce reached the same conclusion in *Potassium Permanganate from the People's Republic of China*, 59 Fed. Reg. 48,419 (Dep't Commerce 1994) (termination of admin. rev.), involving the same product and parties.

[14] Moreover, Plaintiffs did not sustain "substantial prejudice." *See American Farm Lines*, 397 U.S. at 539 (agency's modification of its procedural rules "not reviewable except upon a showing of substantial prejudice to the complaining party.") Plaintiffs' argument that Saha Thai was substantially prejudiced by the continuation of the administrative review necessarily fails. A party is not prejudiced by a "technical defect simply because that party will lose its case if the defect is disregarded. Prejudice, as used in this setting, means injury to an interest that the statute, regulation or rule in question was designed to protect." *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996). Neither the statute nor Commerce's regulations gave Saha Thai a right to be free of the administrative review. It received timely notice, which is all it was due.

[15] The regulation in force when the Domestic Interested Parties submitted their request for review stated "For all time limits * * * the Secretary will consider documents received when stamped by the Central Records Unit with the date and time of receipt." 19 C.F.R. § 353.31(d) (1995). The wording changed in the 1998 regulations to read, "no document will be considered as having been received by the Secretary unless it is submitted to the Central Records Unit and is stamped by the Central Records Unit with the date and time of receipt." 19 C.F.R. § 351.103(b) (1998). The court does not decide if the difference is significant.

regulation merely mandated that if a valid date-stamped copy of the request is produced it will determine the date of receipt. Here, the evidence tends to show that in all likelihood Commerce did misfile the request. While the Domestic Interested Parties should have retained a date-stamped copy, such an error did not deprive Commerce of its ability to act.

The court finds that Commerce had the right under the facts of this case and the then applicable law to exercise discretion in determining whether to grant Saha Thai's request for termination, and that it did not abuse this discretion when it denied the request for termination and continued the administrative review of Saha Thai.

II. *Calculation of the Antidumping Margin*

BACKGROUND

In their second count, Plaintiffs challenge the manner in which Commerce conducted the antidumping review of Saha Thai. Plaintiffs' arguments center around the interpretation of new provisions of the Tariff Act, as amended by the URAA. In particular, Plaintiffs challenge the meaning of "affiliated persons" under 19 U.S.C. § 1677(33) (1994) and the application of adverse facts available pursuant to 19 U.S.C. §§ 1677e(a) and 1677e(b) (1994). The court will first review the facts of Commerce's investigation.

In its first questionnaire to Saha Thai, Commerce requested information to determine whether subject merchandise produced by Saha Thai, or exported to the United States, was sold at prices below the normal value. *Questionnaire* (undated), at 1, P.R. Doc. 138, Def.'s App., Ex. 3, at 6. Commerce requested that Saha Thai provide information on its corporate structure and affiliations. Saha Thai was to provide a list of its ten largest shareholders, as well as a list and description of companies affiliated with Saha Thai "through means other than stock ownership." *Id.* at A–4, P.R. Doc. 138, Def.'s App., Ex. 3, at 15. The questionnaire included a glossary of terms, which stated that "antidumping law subjects transactions between affiliated persons to special scrutiny." The term was defined as it appears in Section 771(33) of the Tariff Act (19 U.S.C. § 1677(33)). *Id.* at App. I, P.R. Doc. 138, Def.'s App., Ex. 3, at 21. Commerce did not request a complete list of Saha Thai's directors and officers.

Saha Thai's response to this questionnaire listed its ten largest shareholders both before and after July 31, 1995.[16] *Proprietary Questionnaire Responses* (July 16, 1996), at Exs. 6–7, C.R. Doc. 2, Def.'s App., Ex. 4, at 15 and 17. Saha Thai identified several companies that "might be considered affiliated parties" based on common management. *Id.* at Exs. 6–7, C.R. Doc. 2, Def.'s App., Ex. 4, at 8–9.[17] In this response, Saha Thai did not identify these companies as members of the Siam Steel Group International Co., Ltd., nor did it mention Saha Thai's membership in

[16] On July 31, 1995, during the middle of the period of review ("POR"), Saha Thai underwent a corporate reorganization. *Proprietary Questionnaire Responses* (July 16, 1996), at 6, C.R. Doc. 2, Def.'s App., Ex. 4, at 8.

[17] [ ]

this group. It also failed initially to identify Company D[18], a member of the Siam Steel Group and a home market customer.

Commerce sought information on the Siam Steel Group and its relationship to Saha Thai in its first supplemental questionnaire. *Supplemental Questionnaire* (Aug. 26, 1996), at 1, C.R. Doc. 56, Def.'s App., Ex. 5, at 3. Saha Thai responded to this questionnaire by listing the names and addresses of the companies in the Siam Steel Group, and by providing a list of common shareholders. *Saha Thai's Response to Supplemental Questionnaire* (Sept. 23, 1996), at Ex. A, C.R. Doc. 8, Def.'s App., Ex. 6, at 10. Saha Thai stated that these companies represented the investments of members of the Karuchit/ Kunanuantakul family. *Id.* at 1, C.R. Doc. 8, Def.'s App., Ex. 6, at 3.[19] The list of Siam Steel Group companies included Company D, but Saha Thai still did not state that it was a home market customer.

Commerce pursued the relationship with the Siam Steel Group in its second supplemental questionnaire. Commerce asked whether any members of the group produced subject merchandise. *Supplemental Questionnaire* (Nov. 1, 1996), at 64, P.R. Doc. 37, Def.'s App., Ex. 7, at 2. Saha Thai responded that no members of the group produced steel pipe and that none of the companies in the group controlled Saha Thai, "through stock ownership or otherwise." *Saha Thai's Response to Supplemental Questionnaire* (Nov. 26, 1996), at 1–2, C.R. Doc. 14, Def.'s App., Ex. 8, at 2–3. Company E[20], a member of the Siam Steel Group, produces PVC lined steel water-pipe. Saha Thai did not state that Company E produced subject merchandise. In its appendix to the September 23, 1996 response to Commerce's first supplemental questionnaire, the description of each Siam Steel Group company stated that Company E manufactured electrical construction materials "such as conduit pipe * * * including PVC lined steel water-pipe, etc." *Saha Thai's Response to Supplemental Questionnaire* (Sept. 23, 1996), at Ex. A–2, C.R. Doc. 8, Def.'s App., Ex. 6, at 11. Commerce ultimately determined that the evidence on the record did not establish that the pipe manufactured by Company E was within the scope of the antidumping duty order. *Final Results*, 62 Fed. Reg. at 53,817.

Commerce conducted a cost verification of Saha Thai's responses from January 27 to February 1, 1997. During verification, Commerce became aware of ownership interests held by Saha Thai executive officers in three home market customers. *Decision Memo—Application of Facts Available* (Mar. 31, 1997), at 4, C.R. 33, Def.'s App., Ex. 14, at 4. At this point, Commerce also gathered further information regarding the Siam Steel Group. After verification, Commerce received public information regarding a potential affiliation between Saha Thai and another Thai pipe producer, Thai Hong Steel Pipe Co., Ltd. ("Thai Hong"), based

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[18] [ ]
[19] [ ]
[20] [ ]

on the management of Thai Hong by the Lamatipanont family. *Id.* at 5, Def's App., Ex. 14, at 5.

Commerce sent Saha Thai two post-verification questionnaires. In the first such questionnaire Commerce asked for a description of all affiliations between Saha Thai, Thai Hong, and the Lamatipanont family. *Supplemental Questionnaire* (Feb. 27, 1997), at 1, P.R. Doc. 83, Def.'s App., Ex. 9, at 1. Saha Thai responded that Thai Hong had entered into bankruptcy in 1992, and attached a bankruptcy certificate from the Thai Ministry of Commerce. *Saha Thai's Post-Verification Response to Questionnaire* (Mar. 12 1997), at 1–2, C.R. Doc. 30, Def.'s App., Ex. 10, at 1–2. Saha Thai stated that Thai Hong was controlled by Surasak Lamatipanont and Samarn Lamatipanont, the nephews[21] of Somchai Lamatipanont, a director and shareholder of Saha Thai, and Surasak's wife, Surang Lamatipanont. *Id.* at 2, C.R. Doc. 30, Def.'s App., Ex. 10, at 2. Saha Thai further stated that Thai Hong had not resumed operations after going bankrupt. *Id.*

In a second post-verification questionnaire, Commerce asked about Thai Tube Co., Ltd., ("Thai Tube") a company which seemed to be the legal successor of Thai Hong. *Commerce's Request for Additional Information* (Mar. 24, 1997), at 1, P.R. Doc. 86, Def.'s App., Ex. 11, at 1. Saha Thai responded that it had "no direct knowledge" of Thai Tube or its relationship to Thai Hong. *Saha Thai's Second Post-Verification Response to Questionnaire* (Mar. 27, 1997), at 1, C.R. Doc. 32, Def.'s App., Ex. 13, at 1. Relying on public filings from the Thai Ministry of Commerce, Saha Thai stated that Mr. Surasak and Mrs. Surang Lamatipanont were the directors of Thai Tube. *Id.* at 3, C.R. Doc. 32, Def.'s App., Ex. 13, at 3. Saha Thai said that Samarn was not a director of Thai Tube. *Id.*[22] Saha Thai listed the number of Saha Thai shares held by Mr. Somchai Lamatipanont, his wife, and his son, but stated that they held no shares in Thai Tube. *Id.* at 4. Saha Thai also restated that Somchai Lamatipanont was estranged from Surasak and Surang Lamatipanont, and that they had no business dealings with each other. *Id.*

Commerce issued the preliminary results of its review on April 10, 1997 and assigned Saha Thai a substitute dumping margin of 29.89 percent, based on adverse facts available. *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 62 Fed. Reg. 17,590, 17,595 (Dep't Commerce 1997) (preliminary results of antidumping duty admin. rev.) [hereinafter *"Preliminary Results"].* Commerce resorted to adverse facts on the basis that Saha Thai had significantly impeded the review by failing to comply with Commerce's requests for complete information on affiliates. Commerce found this determination appropriate under §§ 776(a)(2)(C) and 776(b) of the Tariff Act (19 U.S.C. §§ 1677e(a)(2)(C) and 1677e(b)). *Preliminary Results*, 62 Fed. Reg. at 17,592.

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[21] The March 12, 1997 response stated that Surasak and Samarn Lamatipanont were the estranged brothers of Somchai Lamatipanont, a director and shareholder of Saha Thai. Saha Thai later clarified that Surasak and Samarn were Somchai's estranged nephews.

[22] [ ]

In August 1997, Commerce requested that Saha Thai place on the record of the 1995–96 review portions of its questionnaire responses from a subsequent review for 1996–97. These answers listed the percentage of shares held by various Saha Thai directors and officers, as well as further information regarding the Siam Steel Group. *Saha Thai's Supplemental Response* (Aug. 25, 1997), at Exs. 1–2, C.R. Doc. 50, Def.'s App., Ex. 19, at 3–11. Up to this point, Commerce had not requested a list of the officers and directors of Saha Thai. It was also at this point that the information on the two home market customers and resellers, Companies A[23] and B[24], and another home market customer, Company C[25], was placed on the record.

Commerce issued the Final Results of the Antidumping Duty Administrative Review on October 16, 1997. In the Final Results, Commerce confirmed its findings from the Preliminary Results and applied total adverse facts available to Saha Thai, assigning Saha Thai a dumping margin of 29.89 percent. *Final Results*, 62 Fed. Reg. at 53,821. Commerce found that Saha Thai had "significantly impeded the review by failing to comply with requests for complete information on affiliates." *Id.* at 53,809. Specifically, Commerce concluded that Saha Thai had failed to disclose affiliations with Thai Tube, and three home-market customers (Companies A, B and C), two of which (A and B) were resellers of subject merchandise. *Id.* Commerce also stated that Saha Thai failed to provide complete information concerning ownership and management of the Siam Steel Group. *Id.*

Commerce based its affiliation findings on 19 U.S.C. § 1677(33)(F) "by virtue of common control by several families involved in the ownership and management of Saha Thai." *Id.* at 53,810. On these grounds, Commerce's information revealed that six families hold percentages of Saha Thai's shares and hold all the seats on the Board of Directors. *Id.* Some of these family members are also officers and managers of Saha Thai. Saha Thai's affiliations were established on the basis of the common control and financial holdings these families have in Saha Thai.

Commerce concluded that Saha Thai is affiliated with Thai Tube and Thai Hong pursuant to 19 U.S.C. § 1677(33)(F), "by virtue of common control by the Lamatipanont family." *Id.* Somchai Lamatipanont is the Deputy Managing Director of Saha Thai.[26] Commerce was unpersuaded by Saha Thai's arguments that Somchai Lamatipanont lacked day-to-day managerial control of Saha Thai. Rather, as the officer second to the managing director, Commerce stated that Somchai Lamatipanont would "normally" be in a position of control. *Id.* at 53,813.

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[26] The *Preliminary Results* incorrectly stated that Somchai Lamatipanont was the Managing Director of Saha Thai. Saha Thai submitted evidence on the record after the Preliminary Results indicating that Somchai Lamatipanont is the Deputy Managing Director, and Somchai Karuchit is the Managing Director. *Final Results*, 62 Fed. Reg. at 53,812–813.

The Lamatipanont family was found to be in a position of "legal and operational" control of Thai Tube and Thai Hong because of its ownership and control interests in the two companies. Surasak Lamatipanont and his wife Surang Lamatipanont are Thai Tube's only directors, and Surasak is the nephew of Somchai Lamatipanont. Commerce found Thai Hong was controlled by the same Lamatipanont family, through Surasak, his wife, and his brother, Samarn. Public information disclosed that 98.75 percent of Thai Hong's shares were owned by individuals with the surname Lamatipanont. *Id.*

Commerce also determined that Saha Thai is affiliated with the three home market customers revealed during verification, Companies A, B, and C. Companies A and B are also resellers of subject merchandise. Saha Thai admitted that the families of three Saha Thai directors exercise positions of control in these three companies. *Final Results*, 62 Fed. Reg. at 53,814. Sales to these three home market customers represented more than 5 percent of Saha Thai's total home market sales during the POR. *Id.* at 53,815.[27]

Saha Thai conceded that the Sae Heng/Ratanasirivilai family has an ownership interest in Company A, sufficient to establish its control over this company. *Id.*[28] Commerce found that this family also has an ownership interest in Saha Thai, that it possesses two seats on Saha Thai's board of directors, and that Mr. Kim Hua Sae Heng is the Financial Director of Saha Thai.[29] *Final Results*, 62 Fed. Reg. at 53,815; *Saha Thai's Corrective Supplemental Response* (Sept. 8, 1997), at 2, P.R. Doc. 129, Def.'s App., Ex. 21, at 3.

Saha Thai also conceded that the Lamatipanont family has "substantial ownership interest" in Company B. *Final Results*, 62 Fed. Reg. at 53,815.[30] Somchai Lamatipanont, as discussed above, is the Deputy Managing Director of Saha Thai and a member of the Board of Directors. The Lamatipanont family owns an equity interest in Saha Thai. *Final Results*, 62 Fed. Reg. at 53,815. Commerce thus concluded that Company B and Saha Thai are under the common control of the Lamatipanont family.

Saha Thai further conceded that the Ampapankit family controls Company C. *Id.*[31] This family also has an ownership interest in Saha Thai. Limsiam Ampapankit is the Chairman of the Board of Saha Thai, as well as a director and shareholder.[32] Commerce therefore decided that Company C and Saha Thai are under the common control of the Ampapankit family.

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[28] [ ]

[29] Saha Thai admitted that Mr. Sae Heng is "one of the three Saha Thai officers who, together with one of the other officials can bind Saha Thai with his signature." *Final Results*, 62 Fed. Reg. at 53,815; *Revised Exhibit 3 to Saha Thai Submission* (Oct. 2, 1997), at Ex. 3, P.R. Doc. 133, Def.'s App., Ex. 23, at 8.

[30] [ ]

[31] [ ]

[32] Saha Thai admitted that Mr. Ampapankit is "one of the three Saha Thai officers who, together with one of the other officials can bind Saha Thai with his signature." *Final Results*, 62 Fed. Reg. at 53,815; *Revised Exhibit 3 to Saha Thai Submission* (Oct. 2, 1997), at Ex. 3, P.R. Doc. 133, Def.'s App., Ex. 23, at 8.

Commerce also found that Saha Thai is affiliated with Company D, another home market customer, and Company E, a home market customer and producer of steel pipe, because of their membership in the Siam Steel Group. *Final Results*, 62 Fed. Reg. at 53,816. Commerce found that the Siam Steel Group is a "corporate or family grouping" due to the control of the member companies by the Karuchit/Kunanuantakul family. *Id.* Saha Thai had acknowledged a potential affiliation between certain Siam Steel Group companies and Saha Thai, in response to Commerce's initial questionnaire. *See Proprietary Questionnaire Responses* (July 16, 1996), at 6–7, C.R. Doc. 2, Def.'s App., Ex. 4, at 8–9.[33] Commerce claims it did not conduct a full analysis of affiliation within the Siam Steel Group due to insufficient information. Commerce nevertheless found it reasonable to conclude that Companies D and E are affiliated with Saha Thai due to their common membership in the Siam Steel Group. *Final Results*, 62 Fed. Reg. at 53,816.[34] The finding of affiliation with Company E did not further effect the final results because Commerce concluded that the products manufactured by Company E did not fall within the scope of the review. *Id.* at 53,817.

Commerce stated that the existence of these affiliations was placed on the record too late to obtain additional information necessary to analyze whether or not Saha Thai, Thai Tube and Thai Hong should be collapsed. *Id.* at 53,814. Saha Thai had argued that there was substantial evidence on the record to show that collapsing would not be appropriate. Commerce drew the adverse inference that it was "appropriate to collapse Saha Thai, Thai Tube, and Thai Hong" because Saha Thai "impeded the investigation by failing to disclose relevant information" concerning these affiliations. *Id.* Commerce also stated that the failure to identify the resellers as affiliated prevented Commerce from obtaining information on downstream sales prices and calculating normal value for these sales. *Id.* at 53,815.

Commerce assigned Saha Thai a dumping margin of 29.89 percent, the margin applied to Thai Union in *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 56 Fed. Reg. 58,355 (Dep't Commerce 1991) (final results of antidumping duty admin. rev.) (calculated margin of 38.51 percent assigned to Thai Union); *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 59 Fed. Reg. 65,753 (Dep't Commerce 1994) (amended final results of antidumping admin. rev.) (Thai Union revised weighted-average margin of 29.89 percent on remand from Court of International Trade).

Ferro Union argues that Commerce's findings should be reversed, and asserts four grounds for reversal. Ferro Union first contends that Commerce misconstrued the new affiliation definition in the URAA. Ferro Union states that even if the affiliation determination was lawful,

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[34] Mr. Karuchit, Saha Thai's Managing Director, is also the Chairman of Siam Steel International, Saha Thai's largest shareholder. During verification, Saha Thai "noted * * * that Siam Steel International has investments in 11 of the other members of the Siam Steel Group." *Final Results*, 62 Fed. Reg. at 53,816.

the resort to total adverse facts was unlawful because Commerce disregarded the new statutory requirements prior to applying adverse facts. Ferro Union next asserts that Commerce should not have applied adverse facts because there was sufficient record evidence to conduct a collapsing analysis. Lastly, Plaintiffs argue that Commerce failed to corroborate the secondary information used as adverse facts, and applied an uncorroborated dumping margin.

The court will address each of these arguments in turn.

DISCUSSION

Several URAA amendments to the antidumping statute are at issue in this case. In reviewing Commerce's construction of the statute, the court must first look at "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. If the statue is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

A) *Affiliations*

Prior to the URAA, the antidumping laws contained two definitions for "related parties" in 19 U.S.C. § 1677(13)(1988) and 19 U.S.C. § 1677b(e)(4)(1988). The URAA amended 19 U.S.C. § 1677b(e)(4) to create 19 U.S.C. § 1677(33) entitled "Affiliated Persons," which added section (G) and a definition of control. This section now provides:

> The following persons shall be considered to be "affiliated" or "affiliated persons":
>
> (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
>
> (B) Any officer or director of an organization and such organization.
>
> (C) Partners.
>
> (D) Employer and employee.
>
> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> (G) Any person who controls any other person and such other person.
>
> For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 U.S.C. § 1677(33)(1994). The Statement of Administrative Action to the URAA states that these changes were made in order to address the

realities of the marketplace. Statement of Administrative Action, accompanying H.R. 103–5110 at 838 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4174 ("SAA") (the "traditional focus on control through stock ownership fails to address adequately modern business arrangements * * * [and] including control in the definition of 'affiliated' will permit a more sophisticated analysis which better reflects the realities of the marketplace.").[35]

Commerce's regulations adopted this same definition of "affiliated persons". *See* 19 C.F.R. § 351.102(b) (1998) ("Affiliated persons" and "affiliated parties" have the same meaning as in section 771(33) of the Act [19 U.S.C. § 1677(33)]."). In its Notice of Proposed Rulemaking, Commerce explained that "affiliated persons" is a new term and clarified that "affiliated person" and "affiliated parties" have the same meaning. *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,310 (Dep't Commerce 1996) (notice of proposed rulemaking and request for public comments) (proposed regulations to conform to the URAA). Commerce declined to elaborate on the meaning of either "control" or "affiliated persons." "'Affiliated persons' is a new statutory term embodying new concepts, and the complexity of the relationships potentially covered by this term mitigates against the issuance of detailed regulations at this time." *Id.* at 7,310. Commerce declined further detail on this concept in its Final Regulations, stating that it was "more appropriate" for Commerce to develop its practice regarding affiliation "through the adjudication of actual cases." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,297 (Dep't Commerce 1997) (final rules). The definition of "affiliated persons" in the "Glossary of Terms" attached to the first questionnaire Commerce sent to Saha Thai said "antidumping law subjects transactions between affiliated persons to special scrutiny," but then restated the elements of 19 U.S.C. § 1677(33) without elaboration. *Questionnaire* (undated), at App. 1, P.R. Doc. 138, Def.'s App., Ex. 3, at 21.

Plaintiffs allege that Commerce improperly interpreted this new affiliation standard in several ways in its review of Saha Thai. Ferro Union asserts that Congress spoke directly to the meaning of affiliates in 19 U.S.C. § 1677(33), and that under *Chevron*, Commerce's interpretation is not entitled to deference. As the comments to Commerce's proposed regulations and final regulations make clear, however, "affiliated persons" was a new statutory term which would require further interpretation. Commerce chose to develop this interpretation on a case-by-case basis. One question for the court is whether Commerce's construction of affiliates is permissible.

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[35] The Statement of Administrative Action represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements * * * The Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this statement." SAA, at 1 (quoted in *Delverde, SrL v. United States*, 989 F. Supp. 218, 229 n.18 (Ct. Int'l Trade 1997)).

The court will analyze the four specific challenges Plaintiffs raise to Commerce's interpretation of affiliated persons under 19 U.S.C. § 1677(33).

1) The definition of "control"

Plaintiffs contest Commerce's findings regarding "control" in two instances. First, Plaintiffs contest Commerce's finding that six families controlled Saha Thai. Secondly, they challenge Commerce's determination that Somchai Lamatipanont controlled Saha Thai in his position as Deputy Managing Director.

Plaintiffs express incomprehension over how several families could be considered to control Saha Thai. The plain language of the statute, along with the SAA, make it clear that "control" for purposes of 19 U.S.C. § 1677(33) does not require a finding of *actual* control; rather one controls if one is "legally or operationally in a position to exercise restraint or direction over the other person." *See* 19 U.S.C. § 1677(33). The determination of "control" under the URAA is thus not dependent on actually exercising control, but rather on the *capacity* to exercise control.

The SAA stated that the "traditional focus of control through stock ownership fail[ed] to address adequately modern business arrangements." SAA at 838. The new definition of "control" thus permits a finding that several persons or groups are in a position to exercise restraint or direction over a company. Furthermore, Commerce's regulations stated that in making a determination regarding control, Commerce would consider "corporate or family groupings" among other factors. 19 C.F.R. § 351.102(b) (1998). There is record evidence that several families have an ownership interest in Saha Thai, through their stockholdings, and that all of Saha Thai's officers and directors are members of these six families. *Saha Thai's Corrective Supplemental Response* (Sept. 8, 1997), at 1–2, P.R. Doc. 129, Def.'s App., Ex. 21, at 2–3. Assuming that the evidence is substantial, it would not violate the statute to find that the six families in a position to exercise "restraint or control over Saha Thai" in fact control Saha Thai. *But see* discussion *infra* (regarding whether Commerce properly defined these families).

Likewise, Plaintiffs contest Commerce's finding that Somchai Lamatipanont "controlled" Saha Thai because they claim there is no record evidence that Somchai Lamatipanont exercised day-to-day control over the company. Commerce initially believed that Somchai Lamatipanont was the Managing Director of Saha Thai, but Saha Thai submitted information after the Preliminary Results indicating that Mr. Lamatipanont was the Deputy Managing Director. *Final Results*, 62 Fed. Reg. at 53,812; *Saha Thai's Corrective Supplemental Response* (Sept. 8, 1997), at 2, P.R. Doc. 129, Def.'s App., Ex. 21, at 3. In its case brief, Saha Thai had argued that Mr. Lamatipanont was only a member of the Board of Directors, and failed to state that he was Deputy Managing Director. *Final Results*, 62 Fed. Reg. at 53,813. In its submission in August 1997, Saha Thai argued that only the Managing Director, Mr. Karuchit, exer-

cises day-to-day control over Saha Thai's operations. *See id.*; *Saha Thai's Supplemental Response* (Aug. 25, 1997), at Ex. 2, C.R. Doc. 50, Def.'s App., Ex. 19, at 5. Commerce found, however, that Saha Thai had "offered no evidence to support its assertion that all [positions other than Managing Director] are devoid of any responsibility over either day-to-day operating decisions or major management decisions." *Final Results*, 62 Fed. Reg. at 53,813. Commerce then concluded that a deputy managing director is "normally in a position of control." *Id.*

Commerce also had evidence of Somchai Lamatipanont's shareholdings in Saha Thai, and his directorship position. In light of the fact that the statute only requires that a control person be in a *position* to exercise restraint or direction, and does not require evidence that such a person actually does control a company, it was not unreasonable for Commerce to conclude that Somchai Lamatipanont is in a position to restrain or direct Saha Thai, and thus, is in a position of control.

2) Meaning of family

Ferro Union challenges the meaning of "family" for purposes of 19 U.S.C. § 1677(33)(A). Plaintiffs assert that the statute only foresees that nuclear family members and linear descendants are "family." The subsection provides that "members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants" are affiliated. 19 U.S.C. § 1677(33)(A).

Plaintiffs focus their argument on the finding that the Lamatipanont family controls Saha Thai, Thai Tube, and Thai Hong. Plaintiffs assert that Somchai Lamatipanont and his nephews, Surasak and Samarn, are not covered under the definition of "family" under 19 U.S.C. § 1677(33)(A). Plaintiffs argue that if any relations other than those explicitly listed in (33)(A) are to be included in the definition of family, they can only be nuclear family or lineal relations. The Government and Wheatland focus on the word "including" in 19 U.S.C. § 1677(33)(A), as providing room for Commerce to conclude that family members not listed in section (A) can still be considered "family" under the statute.

The word "including" in section (A) of 19 U.S.C. § 1677(33) is an indication that Congress did not intend to limit the definition of "family" to the members listed in this section. Had Congress intended this list to be definitive, it would have chosen different wording. The wording it did choose evinces an illustrative intent. Commerce's interpretation of this section is reasonable and therefore not subject to reversal by the court.

The Plaintiffs and Wheatland debate whether uncles and nephews can be considered "family" under an ordinary definition of "family." The court agrees with Wheatland that the plain meaning of "family" includes uncles and nephews. *See* Black's Law Dictionary 604 (6th ed., 1990) ("family" may mean "all descendants of a common progenitor * * * those who are of the same lineage.").

Ferro Union also focuses on the claim that Somchai is estranged from his nephews as a means to distinguish them from the definition of family. Neither the statute, nor the regulations, provide for an exception to

family for members who are estranged. If the court were to find that estranged relatives are not members of the same family, it would invite parties in administrative reviews to assert subjective criteria for determining familial relationships. In the absence of Congressional intent to make the family determination based on such subjective criteria, the court will not inject into the inquiry a test which is not administrable.

Although it is statutorily permissible for Commerce to conclude that an uncle and his nephews are "family" for purposes of the statute, Saha Thai was provided with insufficient notice that this relationship was included in the definition of family. Commerce bears the responsibility of asking clear questions, and Saha Thai could not be expected to guess at the meaning and full scope of "family." *See NSK Ltd. v. United States*, 19 CIT 1319, 1328, 910 F. Supp. 663, 671 (1995) ("[r]espondents should not be required to guess the parameters of Commerce's interpretation of a phrase in the statute."). Accordingly, Commerce could not legitimately expect Saha Thai to provide this information without specific direction that uncles and nephews are considered family.

3) The Family as a "person"

Plaintiffs assert that a family cannot be considered a "person" for purposes of 19 U.S.C. § 1677(33)(F),[36] in order to justify Commerce's findings that Saha Thai is affiliated with the various companies by virtue of the common control of a family. As Plaintiffs correctly note, 19 U.S.C. § 1677(33) does not contain a definition of "person," nor does the general definitions section of the URAA. *See* 19 U.S.C. § 3501 (1994).

Commerce's regulations define "person" as "any interested party, as well as any other individual, enterprise, or entity, as appropriate." 19 C.F.R. § 351.102(b) (1998).[37] Plaintiffs assert that none of these examples can encompass a family. On the contrary, a family can reasonably be considered an "entity" or an "enterprise" because family members likely share a common interest.

Plaintiffs also argue that the use of the singular "person" at the end of 19 U.S.C. § 1677(33)(F), as contrasted to the plural at the beginning of the sentence, evinces Congress' intent that "person" be interpreted only as a single individual. The court, however, finds that the singular word "person" can be interpreted to encompass a "family" in order to carry out the intent of the statute. *See First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657 (1924) ("words importing the singular may [not] extend and be applied to several persons or things * * * *except where it is necessary to carry out the evident intent of the statute")* (emphasis added). As previously discussed, the intent of 19 U.S.C. § 1677(33) was to identify control exercised through "corporate or family groupings." SAA at 838. By interpreting "family" as a control person, Commerce was giving effect to this intent.

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[36] Sub-section (F) of 19 U.S.C. § 1677(33) provides "two or more persons directly or indirectly controlling, controlled by, or under common control with, any person" are affiliated persons.

[37] This is the same definition as found in Commerce's earlier regulations. *See* 19 C.F.R. § 353.2(p) (1995–1997).

Once Commerce determined that the Sae Heng/Ratanasirivilai family controlled both Saha Thai and Company A, logically 19 U.S.C. § 1677(33)(F) led Commerce to determine that these companies were affiliated because of the family's control. The determination that the Lamatipanont family controlled Company B, and that the Ampapankit family controlled Company C, also logically led to the conclusion that these companies are affiliated with Saha Thai.

Nevertheless, it is unclear how Commerce defined these families. It seems that Commerce concluded that anyone with the same surname was a member of the same family. On remand, Commerce should inform itself of the nature of the relationships among these people in order to assure itself that it has properly determined that the persons involved are family members as contemplated by the statute, and that the affected companies should have been identified by Saha Thai.

4) "Affiliates of affiliates" as affiliates

Plaintiffs allege that Commerce went beyond the enumerated definitions of "affiliates" and extended the definition to "affiliates of an affiliate."[38] Under this argument, Saha Thai would not be affiliated with Companies A, B, and C, simply because they are each affiliated with one of the family groupings.

In support of its position, Plaintiffs rely on a public briefing by Commerce regarding the new affiliation standard, held on June 18, 1997. *See* Pl. Br., Att. 2. In this overview, Commerce presented three scenarios for affiliation. In scenario 2, A holds a 50 percent interest in B, and a 10 percent interest in C. Commerce stated that under this scenario "A is affiliated with B and A is affiliated with C, this does not mean that B and C are affiliated." *Id.* at 3. Scenario 3 provided an example where A has a controlling equity interest in both B and C, "therefore, B and C are affiliated." *Id.* at 4. Plaintiffs try to equate Commerce's affiliation findings in this case with scenario 2. Commerce, however, found that each family controls *both* Saha Thai and the affiliated company. Therefore, Commerce's findings are akin to scenario 3 and no new affiliation standard has been created.

Plaintiffs also cite *Queen's Flowers de Colombia v. United States*, 981 F. Supp. 617 (Ct. Int'l Trade 1997), where the court found that companies which were not directly related under the terms of 19 U.S.C. § 1677(13)(1988) could not be related by means of a string of related parties.[39] *Queen's Flowers* dealt with the affiliation standard under the pre-URAA statute, and even under that standard, the court found several

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[38] This court will not uphold an extra-statutory definition of "affiliate." *See Delverde*, 989 F. Supp. at 224 (court will not "read into the substantive law [a] definitional provision when there is neither implicit or explicit reference to it and no other support for such a reading.")

[39] In *Queen's Flowers*, Mr. X owned 25 percent of MG. MG owned a 20 percent share of six subsidiary companies. X owned 33 percent of Company Z, so Company Z and MG were related under 19 U.S.C. § 1677(13)(D)(1988). Mr. X also owned 10 percent of Company Y, so X and Y were related under 19 U.S.C. § 1677(13)(B)(1988). Neither Z nor Y, however, were related to MG's subsidiary companies in which MG owned a 20 percent share, because Mr. X's "indirect ownership interests" in these companies were less than 20 percent. Therefore, there was no "person or persons who own[ed] directly or indirectly at least 20 percent" of Z or Y and the MG subsidiaries. *Queen's Flowers*, 981 F. Supp. at 625.

companies affiliated by aggregating the ownership interests of two brothers. *Queen's Flowers*, 981 F. Supp. at 626.

In this case, Commerce did not create a new category of affiliated persons under 19 U.S.C. § 1677(33)(1994). Commerce found that Saha Thai and the three home market customers are directly controlled by three families. Likewise, Commerce found that Saha Thai and the Siam Steel Group are controlled by the Karuchit/Kunanuantakul family. These companies, thus, would be affiliated under 19 U.S.C. § 1677(33)(F) ("two or more persons directly or indirectly * * * controlled by, or under common control with, any person" are affiliated parties).

Therefore, the court concludes that all of Commerce's interpretations regarding "affiliated persons" were permissible. Even though the court's analysis leads it to conclude that Commerce's interpretation of this new statutory term was reasonable, it was not proper for Commerce to expect Saha Thai to foresee the full interpretation of a term which was undergoing development. Saha Thai cannot be faulted for failing to comply with Commerce's interpretation of an admittedly complex, and as yet unexplained, concept. The court finds this to be particularly true with regards to the affiliation of Thai Tube and Thai Hong. Without more detailed questions from Commerce, Saha Thai had no reason to reveal a company owned by the nephews of one of its directors as an affiliate. Therefore, on remand, even if Commerce concludes that it has properly understood the familial relationships, Commerce must exclude any affiliation finding between Saha Thai and Thai Tube/Thai Hong from its analysis of whether it should resort to total adverse facts available.

(B) *Total Adverse Facts Procedure*

Ferro Union argues that Commerce's resort to total adverse facts available was unlawful because Commerce disregarded the new statutory standard for applying adverse facts, pursuant to 19 U.S.C. § 1677e(b)(1994). Section 1677e provides in relevant part:

> **Determinations on basis of facts available**
>
> **(a) In General**
>
> If —
>
> (1) necessary information is not available on the record, or
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections(c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

(b) Adverse inferences

If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

(1) the petition,

(2) a final determination of the investigation under this subtitle,

(3) any previous review under section 1675 of this title or determination under section 1675b of this title, or

(4) any other information placed on the record.

19 U.S.C. § 1677e (1994). As this court clarified in *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221 (Ct. Int'l Trade 1998), Commerce may not automatically resort to adverse inferences once it decides that a party has failed to comply with its requests. *Borden*, 4 F. Supp. 2d at 1246.

The URAA amended 19 U.S.C. § 1677e(a)(1988) to conform to the requirements of Article 6.8 and Annex II of the Agreement on Implementation of Article VI of the GATT 1994. *See Borden*, 4 F. Supp. 2d at 1244. Under 19 U.S.C. § 1677e(a) (1994), Commerce will apply facts available when necessary information is not available on the record or when a party (A) withholds information that Commerce has requested, (B) fails to provide information in a timely fashion or in the form requested, (C) significantly impedes the proceeding, or (D) provides information which cannot be verified in accordance with 19 U.S.C. § 1677m(i). 19 U.S.C. § 1677e(a). The use of facts available is subject to the requirements of 19 U.S.C. § 1677m(d), that a party have a chance to remedy deficient submissions.[40]

Sub-parts (a) and (b) of 19 U.S.C. § 1677e make a distinction between resort to "facts available" (sub-part (a)) and resort to an adverse inference (sub-part (b)). Once Commerce has determined under 19 U.S.C. § 1677e(a) that it may resort to facts available, it must make additional findings prior to applying 19 U.S.C. § 1677e(b) and drawing an adverse

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[40] Section 1677m(d) provides:

(d) Deficient submissions

If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits,

then the administering authority or the Commission (as the case may be) may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses.

inference. Commerce must find that a party "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b); *see also Borden*, 4 F. Supp. 2d at 1246.[41] Under the URAA, Commerce is now required to make more subtle judgments than under the previous best information available ("BIA") standard. The antidumping statute may now be less administratively convenient, but Commerce must conform its administrative reviews to the new provisions. In this case, Commerce did not comply with the required steps of 19 U.S.C. § 1677e prior to applying adverse facts available.

In the Preliminary and the Final Results, Commerce stated it was applying total adverse facts available pursuant to both 19 U.S.C. § 1677e(a)(2)(C) and § 1677e(b), because Saha Thai had significantly impeded the review by "failing to comply with [Commerce's] requests for complete information on affiliates." *Preliminary Results*, 62 Fed. Reg. at 17,592; *Final Results*, 62 Fed. Reg. at 53,809. "Significantly impeding the review" is only sufficient grounds to warrant an application of facts available pursuant to 19 U.S.C. § 1677e(a)(2)(C).[42] The additional finding that a party failed to comply "to the best of its ability" must be made to warrant an application of adverse facts under 19 U.S.C. § 1677e(b). *See Borden*, 4 F. Supp. 2d at 1246. In *Borden*, Commerce "simply repeated its 19 U.S.C. § 1677e(a)(2)(B) finding, using slightly different words." *Id.* The court concluded this was an insufficient basis for drawing an adverse inference.

In this case, Commerce also repeated its 19 U.S.C. § 1677e(a)(2)(C) finding to determine that Saha Thai's responses evinced an inability to comply to the best of its ability, pursuant to 19 U.S.C. § 1677e(b). In the Preliminary Results, Commerce said that Saha Thai failed to act to the best of its ability, on the basis that Saha Thai had "demonstrated an understanding of the affiliated party definition." *Preliminary Results*, 62 Fed. Reg. at 17,593. In determining whether to rely on information pro-

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[41] The SAA states that although the URAA changed the terminology of the former best information available ("BIA") rule, resort to facts available remains "an essential investigative tool in antidumping and countervailing duty proceedings." SAA at 868. The use of adverse inferences conforms to the Antidumping Agreement and current practice. SAA at 870. When a party is uncooperative, Commerce "may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Id.*

[42] Under the post-URAA standard, this is not a sufficient finding for applying adverse facts available, although it was sufficient under the former BIA rule. *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990) (partial completeness in responding to Commerce request "may justify resort to the best information rule."); *Mitsubishi Heavy Indus., Ltd. v. United States*, 17 CIT 1024, 1031, 833 F. Supp. 919, 926 (1993) ("Commerce may resort to BIA 'whenever a party * * * refuses or is unable to produce information requested * * * or otherwise significantly impedes an investigation'."); *Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 36, 628 F. Supp. 198, 205 (1986) (failure to furnish information requested justified Commerce's use of best information available.).

vided by Saha Thai, Commerce allegedly analyzed Saha Thai's information in conformity with 19 U.S.C. § 1677m(e). *Id.* at 17,593.[43]

In the Final Results, Commerce said it was applying total adverse facts available because Saha Thai "significantly impeded the review," and cited 19 U.S.C. § 1677e(a)(2)(C) and 19 U.S.C. § 1677e(b). *Final Results*, 62 Fed. Reg. at 53,809. Commerce did not state that it was applying sub-section (b) on the ground that Saha Thai failed to act to the best of its ability. Commerce can not cite to 1677e(b) for the application of total adverse facts when it has only concluded that a party has significantly impeded the review.[44] The only mention of the 1677e(b) standard came after the Department stated its position on Saha Thai's various affiliates. The Department stated, "[g]iven Saha Thai's failure to identify Company A, Company B, and Company C as affiliates, we continued to find that Saha Thai failed to act to the best of its ability to comply with our requests for information on affiliates." *Final Results*, 62 Fed. Reg. at 53,815. Commerce did not reference 19 U.S.C. § 1677e(b) at this point. Rather, it cited a *Memorandum to the File*, dated October 7, 1997. This memorandum neither states the requirements of 19 U.S.C. § 1677e(b) nor states that Saha Thai failed to act to the best of its ability. *See Memorandum to File: Analysis for Final Results* (Oct. 7, 1997), C.R. Doc. 55, Def.'s App., Ex. 24. This memorandum only reiterates Commerce's conclusion that Saha Thai significantly impeded the review by failing to provide full information on affiliates. Moreover, mere recitation of the relevant standard is not enough for Commerce to satisfy its obligation under the statute. *Borden*, 4 F. Supp. 2d at 1246.

Although in the Preliminary Results, Commerce used the language of 19 U.S.C. 1677e(b) to justify its application of total adverse facts available, and applied some rudimentary reasoning, the court is reluctant to incorporate the statement of the Preliminary Results into the Final Results where, as here, Commerce placed additional information on the record after the Preliminary Results.[45] The Preliminary Results, by their nature, and given Commerce's additional inquires, were subject to

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[43] Section 1677m(e) provides:

(e) Use of certain information

In reaching a determination under section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b of this title the administering authority and the Commission shall not decline to consider information that it is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.

[44] Although these two standards, "significantly impeding" and "failing to cooperate to the best of its ability", appear quite similar, there is a statutory distinction, and only the latter leads to the application of adverse facts. Impeding the review does not have to be read negatively. A respondent could impede a review without intending to do so, for example, because it did not understand the questions asked. The statute requires an additional finding under Section 1677e(b) that a respondent could have complied, and failed to do so.

[45] As discussed above, Commerce requested that Saha Thai place information on the record of the 1995–96 review which Saha Thai had already submitted in a subsequent review for 1996–97. Commerce made this request in August 1997, four months after issuing the Preliminary Results. *Commerce Letter to Saha Thai* (Aug. 21, 1997), P.R. Doc. 121, Def.'s App., Ex. 18.

change. *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) ("preliminary determinations are preliminary precisely because they are subject to change."); *Peer Bearing Co. v. United States*, 12 F. Supp. 2d 445, 456 (Ct. Int'l Trade 1998) (Commerce has flexibility to change position from preliminary determination to final results * * * "preliminary results, by their very nature, are preliminary and subject to change.") (citing *Tehnoimportexport v. United States*, 15 CIT 250, 254–55, 766 F. Supp. 1169, 1174–75 (1991)). The Preliminary Results, assuming *arguendo* that they were sufficient at the time, cannot be relied upon to fill the gaps in reasoning of the Final Results.

Commerce is obliged to explain why it concluded that a party failed to comply to the best of its ability prior to applying adverse facts, and it did not do so here. The Government and Wheatland cite record evidence to support the conclusion that Saha Thai expressed an unwillingness to comply with Commerce's requests. They also argue that if Saha Thai was truly confused regarding the meaning of "affiliated parties," it had the responsibility to seek clarification from Commerce. *See Yamaha Motor Co., Ltd. v. United States*, 19 CIT 1349, 1358, 910 F. Supp. 679, 686 (1995) ("if the instructions were confusing, [respondent] should have sought clarification from Commerce.")[46] Plaintiffs counter that Commerce's initial questionnaire gave Saha Thai no notice as to the importance of the new definition of affiliates. By contrast, the initial questionnaire did signal an amendment in the Department's practice regarding the determination of the date of sale. *Questionnaire* (undated), at 2, P.R. Doc. 138, Def.'s App., Ex. 3, at 2. The court finds that Commerce has not pointed to substantial evidence which shows that the failure to identify Companies A, B, C, D, and E was a failure by Saha Thai to comply to the best of its ability.

As discussed *supra*, the court finds that Commerce's interpretation of "affiliated persons" was permissible, but this does not mean Saha Thai could be expected to understand the full implications of this new statutory provision. Commerce itself recognized the complexity of this provision in its Proposed Regulations. Saha Thai, as one of the first respondents in a case applying the new standard, should not be faulted for failing to understand the full ramifications of "affiliated persons." Commerce should avoid asking questions which require a respondent to guess at its implications. *See Queens Flowers*, 981 F. Supp. at 628 (an "alleged response deficiency cannot support [the] application of BIA where the information sought was apparently never requested.") (citing *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572–75 (Fed. Cir. 1990)).

As indicated, Commerce could not legitimately expect Saha Thai to provide information about Thai Tube or Thai Hong. On remand, Commerce must focus on whether the failure to disclose potential affiliations with Companies A, B, C, and D, as well as the failure to state that Compa-

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[46] In *Yamaha*, the court expressly found that Commerce's instructions were clear. *Yamaha*, 19 CIT at 1358, 910 F. Supp. at 686.

ny E produced PVC lined steel water-pipe, warrants a conclusion that Saha Thai failed to comply to the best of its ability. In order to apply adverse facts available, Commerce must be explicit in its reasoning, and conclude that Saha Thai knew that Companies A, B, C, D, and E could be considered affiliates and deliberately chose not to disclose them as such.

Commerce must also explain why the absence of this information is of significance to the progress of the investigation. Commerce stated in the Final Results that the lack of information regarding Companies A and B hindered Commerce from requesting downstream sales data for the sales to A and B, which prevented the Department from calculating normal value pursuant to 19 U.S.C. § 1677b(a)(5). *Final Results*, 62 Fed. Reg. at 53,815. Commerce also stated that it was unable to examine the common management and ownership of Saha Thai with the Siam Steel Group. *Id.* at 53,816–17. Nonetheless, the court cannot conclude that this alone was a significant impediment, given Commerce's misunderstanding of what it could properly expect of Saha Thai. Further, Commerce did not elaborate on the ramifications of the failure to identify Companies C and D, and ultimately determined that Company E did not produce subject merchandise. If overall the failure to identify these companies was of no significance to the progress of the investigation, then Commerce cannot apply total adverse facts on the basis of the non-identification of these companies.

On remand Commerce will not regard the failure to identify Thai Hong and Thai Tube as a deliberate effort to impede the investigation, or as grounds to conclude that Saha Thai failed to act to the best of its ability. It will decide whether it adequately defined affiliates for the purposes of identification of Companies A, B, C, D, and E, whether lack of identification of these companies impeded the investigation, and whether adverse facts are warranted based on failure to act to the best of ability, given the development of the law and the facts of this case.

(C) *Calculation of the Dumping Margin*

Plaintiffs next argue that there was sufficient evidence on the record to calculate a dumping margin. Ferro Union states that Commerce should have done a collapsing analysis, rather than collapse Saha Thai with Thai Tube and Thai Hong without analysis. Commerce justified collapsing Saha Thai with Thai Tube and Thai Hong on the basis that the record was "incomplete" rendering the Department unable to perform the collapsing inquiry. *Final Results*, 62 Fed. Reg. at 53,814.[47] Commerce, "therefore [made] the adverse inference" that it was "appropriate to collapse Saha Thai, Thai Tube, and Thai Hong." *Id.*

Plaintiffs also argue that there was sufficient evidence on the record for Commerce to calculate a dumping margin without including reference to the resale prices of Companies A and B. Commerce claims these sales failed its standard arms-length pricing test—a test which Saha

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[47] If the record is "incomplete" *only* because Commerce did not specifically ask questions related to Thai Tube/Thai Hong, as indicated above, this conclusion would be inadequate and Commerce must request the data.

Thai challenged. *Id.* at 53,817. Commerce says that because sales to these companies exceeded 5 percent of total home market sales, under its standard practice, Commerce would have requested downstream sales data in order to calculate normal value for these sales. *Id.* at 53,815.

These issues may be mooted by or subsumed into Commerce's remand determinations and will not be decided at this stage.

(D) *Corroboration of secondary information for calculating the antidumping margin*

Ferro Union's final argument is that Commerce unlawfully disregarded the statutory requirement that secondary information be corroborated, when it applied the 29.89 percent dumping margin to Saha Thai.[48] Pursuant to 19 U.S.C. § 1677e(c)(1994), Commerce must corroborate secondary information "to the extent practicable" from independent sources reasonably at its disposal.[49]

The Antidumping Agreement of GATT 1994 and the URAA evince a preference that secondary information be corroborated. While the Antidumping Agreement permits the use of "facts available," the Contracting Parties are required to check secondary information from other "independent sources." Annex II of the Agreement on Implementation of Article VI of GATT 1994 at ¶ 7, *reprinted in* U.S. Trade Representative, Uruguay Round of Multilateral Trade Negotiations 168–169 (1994). The SAA of the URAA further clarifies that "secondary information may not be entirely reliable" and that "corroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value." SAA at 870. Commerce has said it determines the probative nature of a margin based on whether it is reliable and relevant. *Preliminary Results*, 62 Fed. Reg. at 17,593.

Commerce applied a dumping margin of 29.89 percent to Saha Thai. Commerce determined that this was the highest calculated margin from any prior administrative review. *Id.* This was the rate applied to Thai Union Steel Co., Ltd. in *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 59 Fed. Reg. 65,753 (Dep't Commerce 1994) (amended final results) for a 1987–88 period. Commerce found that corroborating this secondary information required "simply that [Commerce] satisfy itself that the secondary information to be used has probative value." *Preliminary Results*, 62 Fed. Reg. at 17,593 (citing SAA at 870). Com-

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[48] The Government argues that Ferro Union is precluded from raising this argument, because Saha Thai did not raise this issue during the administrative review. Ferro Union counters that Saha Thai contested the margin itself and Commerce's methodology in arriving at the 29.89 percent margin.

Commerce did consider the question of which adverse margin it should apply, and discussed corroboration in the Preliminary Results. *Preliminary Results*, 62 Fed. Reg. at 17,593. Given that the agency actually considered this issue and had a chance to review it, the administrative exhaustion requirement has been satisfied. *See Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (court "excuse[s] exhaustion requirements for a particular issue when the agency has in fact considered the issue").

[49] Section 1677e(c) provides:

> **(c) Corroboration of secondary information**
> When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

merce stated in the Preliminary Results that it would, "to the extent practicable, examine the reliability and relevance of the information used." *Id.* Because the only source for calculating dumping margins are administrative determinations, Commerce concluded that if it "chooses as total adverse facts available a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period." *Id.* Commerce stated that the 29.89 percent rate was the highest rate for any prior segment of the proceedings, and that the court had affirmed this rate as applied to Thai Union in a recalculation pursuant to a remand order. *See Primary Steel, Inc. v. United States*, 18 CIT 20, 814 F. Supp. 1317 (1994); *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 59 Fed. Reg. 65,753 (amended final results of antidumping duty admin. rev.). Commerce concluded that this rate was thus neither irrelevant nor inappropriate as "total facts available rate for Saha Thai." *Preliminary Results*, 62 Fed. Reg. at 17,594. Commerce did not revisit the relevance or appropriateness of this rate in the Final Results.

Plaintiffs challenge the application of this margin on the basis that it is neither reliable nor relevant, given that the 29.89 percent rate was applied to a different respondent at a different time period.[50] Moreover, the SAA recognizes that secondary information must be corroborated because it "may not be entirely reliable because * * * it concerns a different time frame than the one at issue." SAA at 870. Previously, the highest rate calculated for Saha Thai in a less than fair value investigation was 17.28 percent. *Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 61 Fed. Reg. 1,328 (Dep't Commerce 1996) (final results of antidumping duty admin. rev.), *amended by Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 61 Fed. Reg. 18,375, 18,376 (Dep't Commerce 1996) (1992–93 review period).

Wheatland asserts that Commerce's only choices for the facts available information was the petition data or the margin information from a previous review, and that the calculated margin was the only margin information available.[51] Wheatland also minimizes the fact that Saha Thai's margin in the 1987–88 review was substantially lower than Thai Union's on the grounds that the question before Commerce in this re-

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[50] Plaintiffs note that Saha Thai was reviewed during this same 1987–88 administrative review and received a rate of 0.49 percent. Much of the information used to calculate Thai Union's rate was based on best information available. In that review, Commerce found that Thai Union's cost of production understated the quantity of zinc actually on the pipes and did not include the cost of couplings. Commerce used the petitioner's calculation to determine Thai Union's cost of production, which was based on information submitted by Thai Union at various times. Commerce also used an IMF country-wide lending rate as best information available, in order to calculate Thai Union's credit costs on its US sales. *See Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 56 Fed. Reg. 58,355, 58,357–358. The court found Commerce's calculation of Thai Union's cost of production "rationally related to Thai's Union's zinc usage and coupling cost." *Primary Steel, Inc. v. United States*, 17 CIT 1080, 1087–88, 834 F. Supp. 1374, 1381 (1993). Likewise, the court approved Commerce's use of the IMF rate as best information available. *Id.*, 17 CIT at 1088–89, 834 F. Supp. at 1382.

By contrast, the rate calculated for Saha Thai during the same review was not based on best information available, but on Saha Thai's responses to Commerce's questionnaires.

[51] In *Borden*, this court found petition margins were not corroborated, and in fact were discredited. Commerce was not permitted to resort to the petition information under a "claim of necessity" where there were other suitable margins available. *Borden*, 4 F. Supp. 2d at 1247–48.

view was whether the margin was appropriate for a collapsed Saha Thai/Thai Hong/Thai Tube, and not simply Saha Thai.[52]

Since the passage of the URAA, Commerce is proceeding on the basis that prior calculated margins are *ipso facto* reliable. *See Extruded Rubber Thread from Malaysia*, 63 Fed. Reg. 12,752, 12,763 (Dep't Commerce 1998) (final results of antidumping duty admin. rev.) ("absent evidence to the contrary, [prior calculated rate] is reliable and has probative value"); *Canned Pineapple Fruit from Thailand*, 63 Fed. Reg. 43,661, 43,665, (Dep't Commerce 1998) (notice of final results and partial rescission of antidumping duty admin. rev.) ("margins from other segments of the proceeding are by definition reliable sources"). Commerce says "relevancy" means that the prior margin should reflect the sales practices of the industry under examination. Commerce has rejected prior margins which are not reflective of an industry's sales practices, even prior to the URAA. *See Fresh Cut Flowers from Mexico*, 61 Fed. Reg. 6,812, 6,814 (Dep't Commerce 1996) (final results of antidumping duty admin. rev.) (Pre-URAA, applying BIA, rejection of a rate because it was "unrepresentative of the other companies in that review, and by extension, of the entire flower industry"); *cf. Extruded Rubber Thread from Malaysia*, 63 Fed. Reg. at 12,763 (post-URAA, applying same rationale, but concluding that a calculated rate did reflect business practices of rubber thread industry). Commerce is essentially assuming that the margins are relevant unless there are extraordinary conditions demonstrating that the margins are irrelevant. The exception is too restrictive.

Commerce must do more than assume any prior calculated margin for the industry is reliable and relevant. Even under the BIA standard, the court instructed Commerce that it cannot select margins which are out of context. *See Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992) ("[Commerce's] authority to select best information otherwise available is subject to a rational relationship between data chosen and the matter to which they are to apply."). Nor can Commerce apply a margin which has been discredited. *See D&L Supply Co. v. United States*, 113 F.3d 1220, 1221 (Fed. Cir. 1997) (it is "improper for Commerce to continue to use, as the BIA rate, an antidumping duty rate that has been vacated as erroneous"). In *D&L Supply Co.*, the court clarified that the purposes for applying the highest prior margin under the BIA scheme was to prevent the exporter from benefitting from refusing to provide information, and to select a margin which "bears some relationship to past practices in the industry in question." *D&L Supply Co.*, 113 F.3d at 1223. Commerce can not select a rate which focuses only on inducing the exporter to cooperate, and ignores the interest in selecting a margin which relates to the past practices of the industry. *Id.* at 1224.

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[52] If collapsing is not appropriate, this reasoning would not be useful on remand.

In the case of Saha Thai, Commerce selected a margin that was calculated eight years prior to the relevant POR, and which was calculated for another producer of subject merchandise. Moreover, much of the information on which Thai Union's margin was calculated was based on BIA. *See Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 56 Fed. Reg. 58,355, 58,357–58; *see also supra* fn. 50. Commerce had available several other margins previously calculated for Saha Thai, all of which were sources "reasonably at its disposal."[53] *See* 19 U.S.C. § 1677e(c). In its Final Results, Commerce did not elaborate on why the 1987–88 Thai Union margin was more probative than other Saha Thai margins, other than the fact that the Thai Union margin was higher. Commerce also has not shown why, under its own definition of relevancy, the Thai Union rate reflects the sales practices of the pipe and tube industry. Even when it is applying total adverse facts, under the URAA Commerce cannot assume the highest previous margin applies simply because it is the one most prejudicial to the respondent.

In order to comply with the statute and the SAA's statement that corroborated information is probative information, Commerce must assure itself that the margin it applies is relevant, and not outdated, or lacking a rational relationship to Saha Thai. The court accordingly remands this issue. If Commerce applies total adverse facts to Saha Thai, Commerce must then corroborate the dumping margin it applies to Saha Thai as secondary information, assuring itself of its reliability and relevancy.

CONCLUSION

The court finds that Commerce reasonably continued the administrative review of Saha Thai, because Commerce had the discretion to deny Saha Thai's request for termination. The court also affirms Commerce's interpretation of "affiliated parties" under 19 U.S.C. § 1677(33). Commerce's interpretation of the new affiliation statute was permissible, in accordance with the law, and is entitled to deference, although Commerce must revisit its factual determinations as to who comprised the families at issue. Further, Commerce did not provide Saha Thai with sufficient guidance for Saha Thai to know it had to provide information on companies owned by the nephews of one of its directors. Therefore, on remand, Commerce must exclude the non-identification of Thai Tube and Thai Hong from its facts available analysis.

The court also remands the Final Results on the ground that Commerce did not properly apply 19 U.S.C. § 1677e in deciding whether it could apply total adverse facts. Commerce must follow the requirements of § 1677e and conduct a separate analysis under sub-sections (a) and (b). If it chooses to apply adverse facts available, Commerce will also

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[53] Prior margins assessed against Saha Thai in other administrative reviews range from 0.49 percent to 17.28 percent.

have to corroborate the dumping margin by showing the relevance of a particular margin and why it may be reliably applied to Saha Thai.

Remand results are due within 60 days. Objections are due 20 days thereafter, responses 11 days thereafter.

(Slip Op. 99–28)

FLORIDA SUGAR MARKETING AND TERMINAL ASSOCIATION, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–05–01303

[Judgment for defendant.]

(Dated March 23, 1999)

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine and *Patrick J. McDonough)* for plaintiff.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lara Levinson, Todd M. Hughes), Richard McManus*, Office of the Chief Counsel for Import Administration, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on cross-motions for summary judgment. In this action plaintiff seeks to have declared unconstitutional the Harbor Maintenance Tax (HMT) established by 26 U.S.C. §§ 4461, 4462 (1994), as applied to interstate shipments.

Between January 27, 1995 and February 20, 1998, plaintiff Florida Sugar Marketing and Terminal Association, Inc., paid this *ad valorem* tax on shipments of sugar from ports of one state to ports of other states. Because the tax is imposed upon shipment, the parties apparently agree that the HMT at issue was assessed upon export from a state, as opposed to import into another state.

Plaintiff asserts that the HMT violates the Export Clause, Art. I, § 9, cl. 5 of the Constitution, which provides "No Tax or Duty shall be laid on Articles exported from any State," relying on *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (holding HMT invalid as applied to exports to foreign countries). The parties to the action disagree as to whether it is a binding holding of *Dooley v. United States*, 183 U.S. 151, 154 (1901) (Congress permitted to impose tax on exports from New York imported into Puerto Rico) that "exports" for purpose of the Export Clause means exports to foreign countries. The *Dooley* court cited *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1868) (holding Import-Export Clause of Con-

stitution[1] did not bar Alabama sales tax on merchandise from another state), for that proposition. The *Dooley* court, however, clearly held that the tax at issue was a valid tax on *imports* into Puerto Rico. *Dooley*, 183 U.S. at 155. Thus, the status of the statement in *Dooley* with respect to exports is not certain.

Despite the fact that *Dooley* has been cited by the Supreme Court specifically for this point, *see Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 n. 44 (1946), plaintiff argues that *Dooley*'s statement on the meaning of "exports" is *dicta*. It cites *Hooven & Allison Co. v. Evatt ("Hooven I")*, 324 U.S. 652 (1945) (holding articles brought from the Philippine Islands into the United States were imports immune from state taxation under the Import-Export Clause, because the Philippines were not part of the United States in constitutional sense), *overruled on other grounds*, *Limbach v. Hooven & Allison Co. ("Hooven II")*, 466 U.S. 353 (1984). *Hooven I* stated in what also seems to be *dicta*, that *Dooley*'s export definition was *dicta*. *Hooven I*, 324 U.S. at 670 n.5. The court, however, need not resolve the exact status of the operative words in *Dooley*.

The parties agree that the *Dooley* court's choice to make no distinction between the meaning of export in the Export Clause and in the Import-Export Clause as set forth in *Woodruff v. Parham*, has been long adhered to. *See, e.g., Kosydar v. National Cash Register Co.*, 417 U.S. 62, 67 n. 5 (1974); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 83 (1946). Plaintiff does not contend that the court can ignore the longstanding view that "exports" means the same in both clauses.

Plaintiffs' main argument is that *Woodruff* (and *Dooley* to the extent it followed *Woodruff*) was wrongly decided, citing the Thomas/Scalia dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609–610 (1997). The dissent contends that the negative Commerce Clause rationale used by the majority to strike down a property tax with an exemption for charitable institutions benefitting residents is untenable. *Id.* at 610. The negative Commerce Clause is said to be unnecessary to check discriminatory state taxes on the commerce of other states because the Import-Export Clause serves that purpose, "*Woodruff*, notwithstanding." *Id.*

Whatever the merits of the point of view expressed in the *Camps* dissent, this court must follow decisions of the Supreme Court which have not been overruled. As accurately stated by plaintiff, "the [Supreme] Court has repeatedly followed *Woodruff* in a line of cases over the years." Pl. Br. at 3. The court must do the same now.

Accordingly, the court finds the Export Clause does not prevent the imposition by Congress of taxes on interstate shipments and judgment is found for defendant dismissing this action for failure to state a claim.

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[1] The Import-Export Clause, Article I, § 10, cl. 2 reads in part:

No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.

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